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Supreme Court of the United States

OCTOBER TERM, 1954

No. 661

UNION MANUFACTURING COMPANY, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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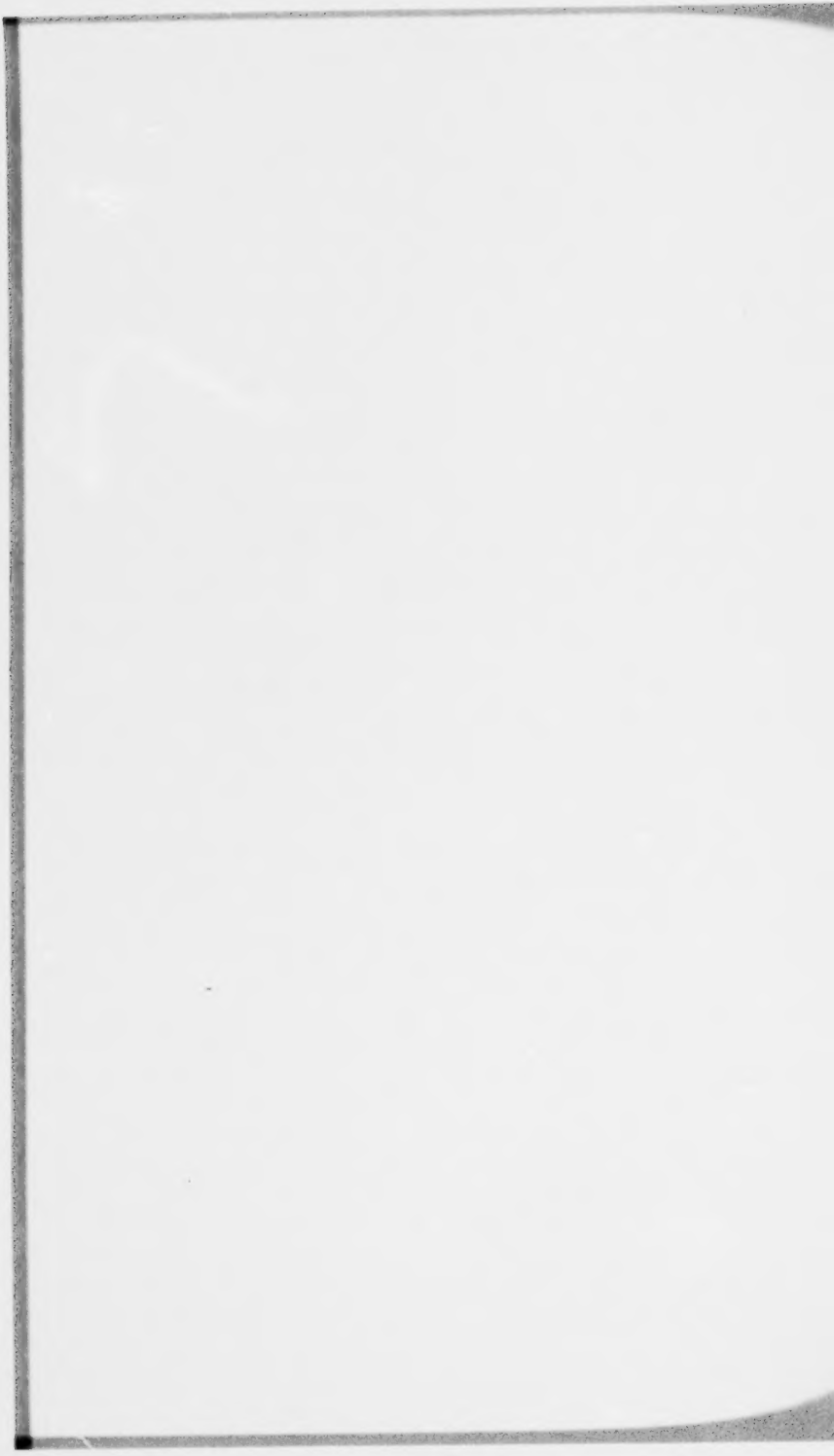

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Petitioner, Union Manufacturing Company, respectfully prays that a writ of certiorari issue to review the decision and Decrees (Appendix pp. 46-49) of the United States Court of Appeals for the District of Columbia Circuit, entered January 14, 1955, upholding a decision of the National Labor Relations Board entered on the 25th day of November, 1953, which ordered the petitioner to bargain with a Union.

CITATIONS TO THE OPINIONS BELOW

The National Labor Relations Board in its case No. 5-RC-1103 issued, on June 12, 1952, a ruling which was a decision and direction not reported in printed volumes, and was entitled a Decision and Direction of Election. (Ap-

pendix, pp. 1-3). On December 12, 1952, the National Labor Relations Board issued a Supplemental Decision and Order reported in 101 NLRB 1028. (Appendix, pp. 3-8). On February 24, 1953, the National Labor Relations Board issued a second Supplemental Decision and Direction, reported at 102 NLRB 1626. (Appendix, pp. 8-13). On November 25, 1953, the National Labor Relations Board issued a Decision and Order reported at 107 NLRB 61 which is the Order under review. (Appendix, pp. 13-22). The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated January 14, 1955 upholding the Decision and Order of the National Labor Relations Board dated November 25, 1953, has not yet been reported and appears in Appendix at pages 23-38.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on January 14, 1955. Petitioner timely filed an application for stay of Opinion and Decree. The Court of Appeals statyed to March 20, 1955 its Opinion and Decree pending application to this Court for certiorari. The jurisdiction of this Honorable Court is invoked under 28 USC, Section 1254 and 2101.

STATEMENT OF QUESTIONS PRESENTED

Where an employer in a union representation election held during the course of a strike, during which strike and prior to the election, strike misconduct took place, properly challenges enough votes to affect the outcome of the election on the ground of strike misconduct beyond the protection of the National Labor Relations Act, as amended, and submits evidence which is conceded by the National Labor Relations Board to be sufficient basis for a hearing on the merits, does the failure or refusal of the employer to take affirmative action, prior to the election, to discharge or permanently replace, or deny reinstatement (no requests for reinstatement having been made) to employees guilty

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of strike misconduct, make employees on strike who are not entitled to reinstatement eligible to vote and does this absence of employer affirmative action in view of the wording of Section 9 (c)(3) of the Act, ("Employees on strike who are not entitled to reinstatement shall not be entitled to vote.") relieve the Board from the necessity of conducting a hearing to determine the question of eligibility raised by the challenges?

STATUTES, RULES AND REGULATIONS INVOLVED

Sections 1, (b); 2, (3); 8, (a)(1) and (5); 9, (a); 9, (c)(3); 10, (f) of National Labor Relations Act, as Amended, 61 Stat. 140 (1947), as Amended, 29 U. S. C. Supp. V, Secs. 151, *et seq.*, found at Appendix, pages 38-41.

Section 102.61 of the Rules and Regulations of the National Labor Relations Board found at Appendix, pages 41-44.

Section 101.18 (b) and 101.20 (d) of the Statements of Procedure of the National Labor Relations Board found at Appendix, pages 44-45.

STATEMENT OF THE CASE

This case presents for correction errors of the National Labor Relations Board which were erroneously affirmed by the United States Court of Appeals for the District of Columbia Circuit (Appendix pp. 46-49). The case is one of importance. It involves a question dealing with the interpretation of Section 9(c) (3) of the National Labor Relations Act, as amended, 61 Stat. 144 (1947), 29 USCA Section 159(c)(3). (Appendix, page 40).

The statute contains this sentence:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

The facts in this case were stipulated in the Court of Appeals. (R. 7-12) The question to be resolved is a question of law, one of statutory construction: Petitioner, a

company which manufactures hosiery, on March 4, 1952 became involved in a strike of a group of its employees which originated prior to any demand for union representation or for economic advantages. Thereafter, while the strike was still current, the American Federation of Hosiery Workers, AFL, petitioned the National Labor Relations Board for certification to represent the employees and an election was held. Between the time that the strike began and the date of the election numerous instances of strike misconduct on the part of the strikers took place. These persons made no application for reinstatement prior to the election and on that day appeared at the polling place to vote. Petitioner challenged enough ballots on the grounds of strike misconduct to affect the outcome of the election. Evidence, which was stipulated in the United States Court of Appeals by the General Counsel of the National Labor Relations Board (R. 7-12) to be sufficient to show a *prima facie* case of strike misconduct, was submitted to the Board Investigator. Petitioner had not replaced, discharged or denied reinstatement to any of the persons involved in the misconduct at the date of the election.

The National Labor Relations Board overruled these challenges without granting to the petitioner a hearing on the grounds that the employer was compelled to take affirmative action against the employees by either permanently replacing them, denying them reinstatement, or discharging them prior to the election. (Appendix, pp. 13-22). Petitioner contends that the particular section of the Act involved, namely, 9(c)(3) means that a striker who engages in strike misconduct is not entitled to reinstatement and, consequently, not entitled to vote, if challenged. Many cases have held that strikers who engage in misconduct are not eligible for the protection of the Act. International Nickel Company, Inc. 77 NLRB 286; Standard Oil of California (El Segundo Refinery), 91 NLRB 1540; Fansteel Metallurgical Corporation (1939), 306 U. S. 240, 257-258, 59 S. Ct. 490, 497.

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Petitioner further contends that the literal meaning of the words of the particular sentence involved in this dispute are clear. It is the purpose and the intent of the entire act to eliminate industrial strife and this particular sentence intended to limit the eligible voters to those employees who had not forfeited their rights to reinstatement. There is nothing in the legislative history of the Act to sustain any other position.

The pertinent rules and regulations of the National Labor Relations Board (Appendix, pp. 41-44) and the Statements of Procedure (Appendix, pp. 44-45) contemplate that a full hearing be held on strikers' eligibility to vote if substantial and material factual issues are presented in support of the challenging of ballots. Consequently, petitioner should have been granted a hearing by the Board concerning the challenged voters' strike misconduct, prior to the opening and counting of the ballots. Therefore, the certification of the Union made in this case and the Opinion and Decree of the United States Court of Appeals for the District of Columbia Circuit is invalid and petitioner is not guilty of an unfair labor practice by reason of its refusal to negotiate with the Union designated by the erroneous action within the meaning of Sections 8(a)(1) and 8(a)(5) of the Act.[1] Furthermore, we have in this instance the interpretation of a section of the National Labor Relations Act which appears to be contrary to the expressed intention of the entire act, namely, to minimize labor disputes, which requires that this Court review this decision with a view to correctly interpret the actual meaning of the Statute involved in accordance with legal principles, with due consideration to the literal meaning of the language used notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit.

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[1] 1 Stat. 140 (1947), as amended, 29 U. S. C. A. Secs. 158(a)(1) and (5).

SPECIFICATIONS OF ERRORS TO BE HEARD

The Court below erred:

1. In holding that Section 9(c)(3) of the National Labor Relations Act, as Amended, means that an employer must take affirmative action against an employee prior to an election in order to be entitled to validly challenge the employees ballot.

2. In holding that an employee is entitled to vote in an election even though he has engaged in strike misconduct which could be the basis for the denial by the employer to the employee of reinstatement and in spite of a timely challenge of his ballot.

3. In failing to hold that a timely challenge to voters eligibility on ground of strike misconduct, absent affirmative action by the employer to terminate employee's services, makes it necessary for the Board to hold hearings to determine the question of eligibility prior to opening and counting the ballots.

REASONS FOR GRANTING THE WRIT

There is here presented an important question concerning the meaning of certain language of the National Labor Relations Act, as amended. 61 Stat. 140 (1947), as amended, 29 U. S. C. A. Sec. 151, *et seq.*

The court below has rendered its decision on the meaning of a particular sentence contained in Section 9(c)(3) of the Act. The question involved is important in that it controls the eligibility of voters in labor elections conducted under the Act. This court has never decided the problem and it should be settled. There are no other decisions of any Circuit Courts of Appeals which have covered the matter.

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The Court Below Did Not Correctly Interpret the Meaning of the Language

The one question before the Court below and this Court is the meaning of the following sentence.

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

This sentence appears as a part of Section 9(c)(3) of the National Labor Relations Act, as Amended.

The Court below stated in its Opinion (R. 61) "In the light of these opposing contentions we think the disputed sentence is ambiguous. On the face of it both contentions have reasonable support. * * *" After considering certain legislative history references the Court below interpreted the sentence as follows:

> "Upon the basis of the history of the sentence here in controversy, we think it clear that it's purpose was to make ineligible strikers whose reinstatement rights had already been destroyed by the employer's action and who were for that compelling reason ineligible for reinstatement at the time of the election. Such being its legislative intent, and the sentence being otherwise ambiguous, we hold that to be its meaning.
>
> "We are in accord here with the authorities which require great weight to be given an administrator's interpretation of the statute he is directed and empowered to administer." (R. 64)

Actually, as will be pointed out later, there is very little in the legislative history which sheds any light on the meaning of this sentence for the purposes of this case. The dissenting judge below in his opinion (R. 65-74) based his conclusions upon the general legislative intent of Congress in enacting the law. He concluded, (R. 59), it being the general purpose to minimize industrial strife and to peaceably settle labor disputes, that this particular sentence was not ambiguous and that it's plain meaning was consistent with this petitioner's position that it makes ineligible to vote if timely challenged an employee who is

on strike and who is not entitled to reinstatement. He further agrees that an employee is not entitled to reinstatement if he has engaged in strike misconduct.

I.

In this case a group of employees of the Petitioner went on strike on March 4, 1952, without making any demands upon the Petitioner, either for union representation or for economic advantages. A short time thereafter, on, to wit, March 12, 1952, the American Federation of Hosiery Workers, AFL, approached the Petitioner with a demand that the Petitioner bargain collectively with it as the representative of the employees. At that time, there had been no election or certification of any Union to represent said employees. The Petitioner rejected this request and the strike and picketing, some of which was unlawful, continued until the date of election on, to wit, June 25, 1952. Many of said strikers performed acts of strike misconduct which rendered them not entitled to reinstatement. Prior to the time of the election, none of these persons had made application to the Petitioner for reinstatement. Some of said strikers had obtained permanent employment elsewhere. The Petitioner had not, prior to the election, taken any discharge action. At the time of the election, Petitioner challenged the votes of certain of the strikers on the ground of strike misconduct and/or on the ground that they had obtained permanent employment elsewhere.

The Board in considering these challenges originally, by its Order of October 2, 1952, (Appendix, p. 9) ordered a hearing on all votes challenged on the grounds of strike misconduct and/or the obtainment of permanent employment elsewhere. Thereafter, pursuant to a "Motion to Amend Order Directing Hearing on Challenged Ballots" filed by the Union, the Board reversed its position and overruled the challenges on the grounds of strike misconduct, by an interpretation of Section 9(c)(3) of the National Labor Relations Act, as amended, wherein the Board stated that an employer must take affirmative action

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to permanently replace, discharge, or deny reinstatement to the alleged guilty voters, before their ballots can be validly challenged. It is significant that in this same order a hearing was directed as to certain employees whose votes had been challenged on the grounds that they had obtained permanent employment elsewhere. Counsel for the Board conceded that the exhibits which Petitioner attached to its Answer to the Complaint of the Board, established a sufficient showing of strike misconduct on the part of each of the challenged voters to warrant a hearing on the merits, assuming the Board's ruling was erroneous. (R. 7-12)

Petitioner submits that the Court arrived at a conclusion as to the meaning of Section 9(c)(3) of the National Labor Relations Act,[2] as amended, which was totally unwarranted by the language of said section. This portion of the Act states:

> "(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held. *Employees on strike who are not entitled to reinstatement shall not be eligible to vote.* In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election." (Italics supplied)

The foregoing is the section of the Act that the Court interprets to mean that an employer must have taken affirmative action to discharge, refuse reinstatement, or permanently replace the challenged voters before the election date in order to be able to challenge the individual's ballot.

A number of Court and Board decisions have held that strikers, who have engaged in unprotected conduct and have been discharged or denied reinstatement by the employer, are not entitled to an order of reinstatement. Deena Artware, Inc., 86 NLRB 732, enforced as modified, 6th Circuit 198 F. 2d 645; International Nickel Co., Inc., 77 NLRB

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[2] 61 Stat. 144 (1947), as amended, 29 U. S. C. A. Sec. 159(c)(3).

286; Standard Oil of California (El Segundo Refinery), 91 NLRB 1540; NLRB v. Fansteel Metallurgical Corp., (1939) 306 U. S. 240, 257-258, 59 S. Ct. 490, 497; 83 L. Ed. 267, 123 ARL 599.

In Victor Products Corporation v. NLRB (U. S. Court of Appeals for the District of Columbia Circuit, 93 U. S. App. D. C. 56, 58, 208 F. 2d 834, decided July 16, 1953, the Court stated:

> "The law which protects proper union activity therefore protects peaceful picketing, but does not protect striking employees who forcibly debar other employees from entering the place of employment."

Also see NLRB vs. Perfect Circle Company, 162 Fed. 2d 566, 7th Cir., (1947); W. T. Rawleigh Company vs. NLRB, 190 Fed. 2d, 832; 7th Cir., (1954); NLRB vs. Fansteel Corp., 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490, (1939).

As was pointed out by the Court in the Rubin Bros. case 203 F. 2d 486, (1953), at page 488:

> "If anything is settled in labor law under the Act, we think it is that membership in a union does not guarantee the member against discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity."

Again quoting from the Rubin Brothers case at page 488, we find that "Having voluntarily left Petitioner's employ to go on strike," the employee "had the right, *and only the right*, if she applied before she was replaced, not to be refused reinstatement merely because she had gone out on strike or for any other union activity." (Emphasis supplied). So it is that an employee does not have an absolute right to reinstatement. All that the employee does have is the right to apply for reinstatement, which right may not be destroyed by a discriminatory refusal to reinstate.

This case makes it perfectly clear that the employee does not have the right to be discharged. Thus the discharge right, subject to the protective words of the Act, is re-

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served to the employer. In the instant case, the only affirmative action available to the employer was discharge because there was no request for reinstatement. When the Board undertakes to force the exercise of the right of discharge, whom is the Board representing? Certainly, it can not be the employee. Likewise, it cannot be the Petitioner for nowhere does the Act give to the Board authority to force an employer to exercise any of its rights.

In the case of NLRB vs. Fansteel Metallurgical Corporation, 306 U. S. 240, 257-258, 59 S. Ct. 490, 497, 83 L. Ed. 627, 123 ALR 599, this Court in dealing with the discharge of employees engaged in a sit down strike said:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlement of disputes by providing legal remedies for the invasion of the employees rights. Elections may be ordered to decide what representatives are desired by a majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of employees rights, to assure them self organization and freedom in representation, *not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct.* We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure."

In Maryland Drydock Company vs. NLRB, 4th Circuit, 183 F. 2d p. 538 (1950) the Court said on page 540:

> "This Court has repeatedly held it not to be an unfair labor practice to discharge employees who have

been guilty of violence or of unlawful interference with company property."

In the case of National Labor Relations Board vs. Ohio Calcium Company, 5th Circuit, (1943), 133 F. 2d 721, the employer had been negotiating with the Union concerning certain terms of employment and working conditions. Because the employer would not agree to certain demands of the Union a strike was called. The ordinary complement of the plant was approximately fifty men. During the course of the strike much violence took place. Finally, the Union voluntarily called off the strike and made an offer for the employees to return to work. The employer did not take back the employees and thereafter refused to bargain with the particular Union on the ground that, since the majority of the former employees were those persons who elected the Union and they were no longer employed in the plant, the previous certification of the particular Union was no longer effective since it was not the choice of the employer's then present employees. The Court sustained the position of the company and said at page 728:

> "Viewing the evidence in the light most favorable to the Board's decision and all reasonable inferences to be drawn therefrom, we are of the opinion that all of the respondent's striking employees except Perry Willis *terminated their employee-employer relationship by reason of their lawlessness during the progress of the strike.*" (Italics supplied)

The above case was, of course, decided before Section 9(c)(3) was enacted in its present form. However, the Act was not changed in any manner, by amendment, which would invalidate this decision of the Court concerning the point mentioned above.

In the case of National Labor Relations Board vs. Kelco Corporation, 4th Circuit, (1949) 178 2d 578 the Court said at page 581:

> "In Southern Steamship Company vs. NLRB, 316 U. S. 31, 62 S. Ct. 886, 894, 86 L. Ed. 1246 there was no

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showing that any of the seamen who had engaged in unlawful conduct had been convicted of crime; the Supreme Court nevertheless reversed an order directing their reinstatement saying: 'Sec. 10(c) of the National Labor Relations Act, 29 USCA Sec. 160(c) permits the Board to require an employer who has committed an unfair labor practice to take 'such affirmative action including reinstatement of employees * * * as will effectuate the policies of the Act.' This authorization is of considerable breadth, and the Courts may not lightly disturb the Board's choice of remedies. But it is also true that this discretion has its limits, and we have already begun to define them * * *."

Again on page 581 the Court said:

"The rule seems well settled that serious acts of violence on the part of striking employees should bar them of reinstatement, whether they have been prosecuted therefor or not. * * *".

In Wilson & Co., Inc. vs. National Labor Relations Board, 7th Circuit (1941), 120 F. 2d 913 the Court said at page 924, inter alia:

"We concede, without reservation, the right of employees to strike. Such right is theirs either for good cause or no cause. A strike, however, must be conducted in a lawful manner. When so conducted, the striker retains his status as an employee and is protected by the Act. When unprovoked violence is resorted to, however, the striker, as held in the Fansteel case, is no longer protected and what he thereafter obtains from the employer must be at the latter's discretion. It therefore appears that there is little, if any, room for argument but that petitioner was within its rights in its position that it be accorded the privilege of selecting from those guilty of violence, the ones which it would reinstate."

On this same page the Court said, inter alia:

"It is claimed Petitioner refused to identify those of the Union Members it might deem objectionable, and its admission that some of them 'might be officials or

> otherwise prominent in the union.' We do not believe Petitioner was required to name such persons in advance. *That was a bridge to cross when application for reinstatement was made.* * * *" (Italics supplied)

In the case of Standard Lime and Stone Co. vs. National Labor Relations Board, 4th Circuit, (1938), 97 Fed. 2d 531 the Court said at page 535, inter alia:

> "The right of an employer to discharge or to refuse to reinstate a man who has committed a crime which endangers the safety of his fellow workers for the integrity of the plant cannot be successfully challenged. The statute does not purport to destroy this right, or contemplate that an employer must continue to employ or to treat as employees men who have engaged in unlawful conduct of this character. Nor would such an interpretation effectuate the policies of an act designed to remove the sources of industrial strife by encouraging friendly adjustment of industrial disputes."

Further the Court said, at page 536:

> "The only charge against the Company was its failure after the enactment to continue to bargain collectively in response to the Union's request of July 15th; but before this request was made, the acts of violence and breaches of the criminal law instigated by officials of the Union had taken place. The Union was therefore no longer entitled to recognition since it could no longer speak for a majority of the men whom the Company was required to recognize as its employees for the purpose of collective bargaining."

Although this case was decided immediately after the effective date of the first National Labor Relations Act, the terms of the present Act, as amended, have not changed this particular situation. Petitioner contends that the doctrines enunciated in this opinion are still valid and that all of the decisions support Petitioner's contention of the true meaning and interpretation of the Act in its present form.

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It is axiomatic in the law that interpretation of language used, in the absence of patent ambiguities, shall be literal. Literal interpretation of this sentence should mean that *any employee who is on strike and who is not entitled to reinstatement shall not be eligible to vote.* (Italics supplied)

Petitioner takes the position that this sentence means that any employee, or ex-employee, who by reason of the Act is not qualified for the protection of the Act, if he has been lawfully replaced, lawfully discharged, or is subject to denial of reinstatement by reason of unlawful strike activity is ineligible to participate in an election. The Court below, in its decision, (Appendix, pp. 23-38) has attempted to read into the law and the decisions more than their logical interpretation.

Petitioner thinks that the best illustration of its position is embodied in a consideration of the "replacement" theory. An economic striker can be replaced by a permanent employee to take over the same job and thereafter said economic striker cannot vote, but the replacement can. This, in and of itself, is a clear cut situation. Would the Board have ordered hearings to determine voting eligibility if votes had been challenged for this reason?

Certain voters in this case were challenged on the ground that they had obtained permanent employment elsewhere. The Board has seen fit to order hearings on the merits as to whether or not these particular voters had secured permanent employment elsewhere so as to be ineligible to participate in the election. (Appendix, pp. 13-22) Does this situation present a problem wherein the employer must take affirmative action? The answer obviously is that it does not. In other words, the employer by presenting prima facie evidence of permanent employment elsewhere, has raised a substantial and material factual issue which can only be determined by a hearing prior to the opening and counting of the particular ballots involved. Now the Board attempts by administrative fiat to impose an entirely different rule as to persons ineligible to vote, because they have engaged in strike misconduct, on the grounds that

the employer must have taken affirmative action to permanently replace, discharge, or deny reinstatement, to the particular persons involved prior to the election date. (Appendix, pp. 13-22) Whence flows such authority?

Since the Board has seen fit to order hearings on the question of whether or not an employee, or an alleged employee, has obtained permanent employment elsewhere is it not equally logical to arrive at the conclusion that an employer who alleges that an employee has engaged in strike misconduct, is entitled to a hearing, if he presents prima facie evidence of such misconduct, before the opening and the counting of the particular employee's ballot?

II.

Petitioner believes that the words and language used in the particular section, 9(c)(3) here involved, and other related parts of the Act and Rules of the National Labor Relations Board, sustain its position that strikers who participate in strike misconduct are ineligible to vote in a representation election. However, the Board, has decided to read into this particular part of the Act, an interpretation which petitioner believes is erroneous. Careful study of all pertinent evidences of legislative intent on this particular section of the Act is not helpful to resolve the problem here presented. There was no discussion of a situation where voters would be challenged on the grounds of strike misconduct which would make them ineligible for reinstatement.

The Legislative History of the clause that "employees on strike who are not entitled to reinstatement shall not be eligible to vote" is brief but fairly revealing.

H. R. 3020 (Legislative History Labor Management Relations Act, 1947, Volume 1) page 58, did not contain the sentence. It appeared first in the Senate version of the Bill. It then read, "Employees on strike who are not entitled to reinstatement shall not be eligible to vote unless such strike involves an unfair labor practice on the part of the employer."

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In House Report No. 245 of H. R. 3030 (Legislative History Labor Management Relations Act, Volume 1), page 303 it is stated that "the purpose of the whole clause is to prevent a man's losing his job when he engages in a *lawful strike.*" (Italics supplied.) It is pertinent to note here that the purpose was not declared to be the protection of unlawful conduct. It may very well be that during a lawful strike (as in the instant case) an employee may be guilty of unlawful conduct. Certainly it can not be seriously contended that the purpose of this clause is to protect such unlawful conduct.

Senate Majority Report No. 105 on Senate Bill 1126 (Legislative History of the National Labor Management Relations Act, 1947 Volume 1) p. 431 states that

> "It appears clear that a striker having no right to replacement (sic) should not have a voice in the selection of a bargaining representative and the Committee bill so provides."

The Senate Minority Report No. 105, part 2 on S. 1126 (Legislative History of Labor Management Relations Act, 1947, Volume 1), p. 472, in commenting on Section 9(c)(3) states:

> "This restriction is not conditioned upon replacement or an offer of reinstatement by the employer. It is automatic."

In the Congressional Record, Senate, for April 23, 1947, page 3954, (Legislative History of Labor Management Relations Act, Volume 2, p. 1014) the author of the Senate version, Mr. Taft, is quoted as follows: "The Bill provides that in elections, one shall not have the right to vote if he has no right to be reinstated in his employment. * * *" Again, it is pertinent to point out that Senator Taft explained that the right to vote was not open to an employee if he has "no right to be reinstated". It will require a constrained construction to interpret such plain language as meaning, as the Board contends, that an employee on strike

is eligible to vote except and unless he has been discharged or refused reinstatement. The Board, in substance, is rephrasing Senator Taft's statement to read that one shall have the right to vote unless he has been discharged or denied reinstatement. The Board veers away very carefully from Senator Taft's phrase of "right to be reinstated in his employment."

Considering these statements, it is clear that there was an absence of the consideration of the question involved in this case. Nowhere in the discussion, bills, etc., of the House of Representatives and the United States Senate is there any contemplation of the situation of a striker who engages in strike misconduct attempting to vote in a representation election which is held during the continuance of the particular strike in which the misconduct took place. Consequently, Petitioner contends that any interpretation of the meaning of the Act should be predicated upon the literal meaning of the words used in Section 9(c)(3) and be consistent with existing Court and Board decisions on strike misconduct which places particular individuals, because of their activity, outside of the protection afforded by the National Labor Relations Act, as amended.

An employer has the right to discharge or to refuse to reinstate employees who, during a strike, have engaged or participated in conduct not protected by the Act or who have "obtained any other regular and substantially equivalent employment." (Section 2(3) of the Act.) (Appendix, p. 39) More specifically, the Petitioner takes the position that its striking employees who engaged in strike misconduct forfeited their right to reinstatement and thus became ineligible to vote. Likewise, as to employees who had obtained other regular and substantially equivalent employment.

The determination of an employee's eligibility to vote is not, as the Board contends, conditioned upon affirmative action by the employer. That this is so is self-evident from the inherent fact that no act of any employer can be or become the determinant of an employee's entitlement to reinstatement. Were it otherwise, any employer by a dis-

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charge or a refusal to reinstate could destroy the right to vote by merely taking either of those affirmative actions. No act of an employer can divest an employee of the right to reinstatement and the companion right of eligibility to vote.

Assuming, arguendo, that an employer must take affirmative action, the question presents itself as to which of the available alternatives the employer must choose.

The right to discharge belongs to the employer. The right to refuse to reinstate also belongs to the employer. These rights may not be cut down or infringed upon by arbitrary administrative action. In the exercise of its right to discharge, the employer has the initiative. In the exercise of its right to refuse to reinstate, the employer does not have the initiative. That lies with the employee. To require that the employer take affirmative action to exercise either of its rights is to encroach upon those rights and amounts to administrative coercion. Whence does the Board derive such power?

Assuming, further, that the Board may require the employer to take affirmative action and that the employer complies, the action is vain because such action is not, and from the nature of the situation cannot be, the determining factor of eligibility. If the employer improperly discharges, the eligibility of the voter is in nowise impaired. Likewise, if the employer improperly declines to reinstate, the eligibility of the voter remains untarnished. What authority does the Board have to circumvent the elementary rule that the law does not require the doing of a vain thing?

Still assuming, arguendo, that the Board may compel an employer to exercise one of its two rights of discharge or refusal to reinstate, which of these rights must the employer exercise? Must the employer discharge or must the employer decline to reinstate?

If the employer must decline to reinstate, how may that right be exercised in the absence of an application for reinstatement? If the employee fails to make application for

reinstatement, how may the employer decline reinstatement? In the instant case, it is a matter of stipulation that "no request seeking reinstatement was made by any of the aforesaid * * * employees prior to the time of the aforesaid election." (R. 7-12)

So, the only affirmative action open to the Petitioner was the exercise of its right of discharge, a right which is exclusive to the employer and in which the employee has no share. The right of discharge is absolute, subject only to the requirement that it be not exercised because of union activity. The Board has no power to compel the exercise of this right. Further, the idea that the Board may require an employer to discharge an employee is repugnant to the declared purpose and policy of the Act. (Labor Management Relations Act of 1947, as amended by Public Law 189, 195, Section 1(b).)

The employer, for many legitimate reasons, may not desire to exercise its right of discharge. For instance, rather than subject itself to possible unfair labor practice charges in connection with numerous discharges, the employer may prefer to exercise his right of refusing to reinstate. He may have chosen to exercise this prerogative, for example, in order to ascertain who among his employees actually desired to come back to work. He may have theorized that to discharge all was to invite action by a larger number than might be involved were he merely to refuse reinstatement to such group as might eventually apply for reinstatement. To attempt to require that Petitioner yield this alternative right is to indulge in administrative coercion for which there is no lawful authority expressly or impliedly conferred by the Act.

If the employer elects, as lawfully he may, to rely upon his right of refusal to reinstate and exercises that right in connection with applications made after certification, will the challenges, timely made, then be sustained? Or is there some time element that enters into the Board's formula? When does the Board contend that the election to refuse to reinstate must be made?

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All the Petitioner in the instant case has requested is that there be a hearing by the Board to determine the eligibility of employees on strike who, according to the Petitioner's contention, are not entitled to reinstatement. Assume that such a hearing had been held, as the Board originally ordered, and the Board had found that certain employees had engaged in unprotected activity which would justify discharge or refusal to reinstate. This would have been tantamount to finding that those certain employees on strike were not entitled to reinstatement, in which event they would not have been eligible to vote.

In its "Supplemental Decision and Order" (Appendix, pp. 3-8) the Board said:

> "If this status as an employee, albeit one out on strike, has not ended through one of these means, (lawful discharge or refusal to reinstate) by the date of the election, the individual is entitled to cast a ballot for the selection of a bargaining representative, *unless as the statute provides, he is then a striker not entitled to reinstatement.*" (Italics supplied)

With that statement this Petitioner agrees. It declines respectfully, however, to accept the Board's view that entitlement to reinstatement is predicated upon some affirmative act of the employer. The Petitioner's position is that the loss of entitlement to reinstatement is occasioned by the unprotected conduct of the employee and that one who has engaged in unprotected conduct such as in the instant case automatically loses his entitlement to reinstatement and that this right may be restored only if the employer waives its corresponding right of refusal to reinstate. This is where the Board and the Petitioner part company.

The Act does not declare that the employer must take affirmative action. Had that been the legislative intent, it must be assumed that the Congress would have so expressed itself. To adopt the Board's requirement of affirmative action requires the addition of words to the Act. There is no justification for such addition because the words of the Act are clear, simple and unambiguous and must be

interpreted in their common acceptation. No words of limitation circumscribe or modify the declaration that "employees on strike who are not entitled to reinstatement shall not be eligible to vote." The words of limitation which the Board is invoking come from the Board and not from the Congress.

Not being "entitled to reinstatement" is a condition that obviously must exist at the time of the balloting in order to render a voter ineligible. But, if at the time of voting, an employee on strike who has engaged in unprotected activity, as in the instant case, has deliberately, as properly he may, refrained from applying for reinstatement, may he thereby circumvent the requirement of eligibility?

Being "not entitled to reinstatement" is a status which, by his own misconduct, the striking employee creates. Thereafter, it does not lie within his creative power to change that status. He then becomes a suppliant dependent upon the gift of condonation—a gift which the employer may graciously extend or lawfully withhold.

The "Supplemental Decision and Direction", (Appendix, pp. 8-13) after quoting the Senate Committee on Labor and Public Welfare, contends that the sole purpose of 9(c)(3) was to eliminate the prior Board rulings that both strikers and replacements could vote at Board conducted elections. The Supplemental Decision and Direction then continues: "With the intent of preventing two votes being cast for one job the Congress changed this rule by the quoted provision of 9(c)(3), and directed that strikers whose jobs had been permanently filled by replacements were ineligible to vote." There is no language in the Act directing any such thing. If Congress had meant to limit eligibility in this fashion, it must be assumed that the congressional dictionary made available the necessary words to spell out such a restriction.

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III.

In the agreed statement of facts (R. 7-12) there appears the following statement:

> "Counsel for the Board, for purposes of this review, concede that these exhibits establish a sufficient showing of strike misconduct on the part of each of the challenged voters to warrant a hearing thereon on the merits, assuming the Board's ruling is erroneous."

The Board by the agreed statement of facts concedes that if the Board's ruling has been erroneous petitioner is entitled to a hearing on the challenged ballots.

Petitioner takes the position that there was no justification for the action of the Board in denying to it a hearing as to the ballots challenged on the grounds of strike misconduct and that, as a matter of fact, the first position of the Board ordering a hearing, prior to the opening and counting of the ballots was correct. See Section 102.61 of the Rules and Regulations of the National Labor Relations Board (Appendix pp. 41-44); Section 101.18 and Section 101.20 of the Statements of Procedure of the National Labor Relations Board (Appendix pp. 44-45) for election procedures.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN R. FITZPATRICK,
EDWARD J. LYNCH,
1406 G Street, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:

HARRY J. MAGINNIS.

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APPENDIX

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

UNION MANUFACTURING COMPANY, *Employer*

and

AMERICAN FEDERATION OF HOSIERY WORKERS, AFL
Petitioner

Case No. 5-RC-1103

Decision and Direction of Election

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act;

All production and maintenance employees at the Employer's Frederick, Maryland, full fashioned hosiery plant, excluding office clerical employees, watchmen, professional employees and all supervisors as defined in the amended Act.

5. The record indicates that the employees at this plant have been on strike since on or about March 4, 1952. While the record does not show the exact nature of the strike, no unfair labor practice charges have been filed affecting these employees. Accordingly, we shall direct an immediate election and permit all employees to participate who were employed during the payroll period immediately preceding the date of this direction. All persons hired since the commencement of the strike and all strikers shall be presumptively eligible to vote, subject to challenge. Challenged ballots shall not be counted, however, unless they affect the results of the election, in which instance the question of eligibility will await further investigation concerning the status of the affected individuals.

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Section 102.61 and 102.62 of the National Labor Relations Board's Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who

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have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether (or not) they desire to be represented, for purposes of collective bargaining, by American Federation of Hosiery Workers, AFL.

JOHN M. HOUSTON, Member
ABE MURDOCK, Member
PAUL L. STYLES, Member
National Labor Relations Board

Signed at Washington, D. C., June 12, 1952.

* * * * * * * * * *

Supplemental Decision and Order, 101 N.L.R.B. 1028

On June 25, 1952, pursuant to a Decision and Direction of Election by the Board,[1] an election was conducted in the above-entitled proceeding under the direction and supervision of the Regional Director for the Fifth Region. At the close of the election, the Tally of Ballots was issued and duly served upon the parties concerned. The Tally reveals that of approximately 158 eligible voters, 157 cast ballots, of which 1 ballot was for the Petitioner, 46 ballots against the Petitioner and 110 ballots were challenged. On September 12, 1952, the Regional Director issued his Report on Challenges in which he recommended that the challenges to 2 ballots be sustained and that the challenges to 21 ballots be overruled. He further recommended that a hearing be held as to issues raised with respect to the ballots of 87 individuals. As no exceptions were filed by any of the parties to the Regional Director's Report, the Board, on October 2, adopted the recommendations therein and ordered that a hearing be held.

On October 23, the Petitioner filed a "Motion to Amend

[1] *Union Manufacturing Company*, 5-RC-1103, June 12, 1952, not reported in printed volumes of Board decisions.

Order Directing Hearing on Challenged Ballots". The facts upon which this Motion is based are as follows. Since on or about May 4, 1952, a date preceding the filing of the petition in this case, an economic strike has been in progress at the Employer's plant here involved. The Board's Decision and Direction of Election, accordingly, provided that "all persons hired since the commencement of the strike and all strikers shall be presumptively eligible to vote, subject to challenge." Of the 87 challenged ballots set for hearing, 82 were cast by strikers who the Employer contends were ineligible to participate because they had engaged in "debarment" activity on a picket line at the Employer's plant prior to the election.[2] The Employer in effect asserts that, because of the "debarment" activity, these strikers lost reinstatement rights and were not entitled to vote. It further contends that 23 of the same individuals had secured permanent employment elsewhere at the time of the election and were no longer its employees. The Petitioner's motion requests that the Board order that the hearing be restricted to issues other than "debarment" activity and that ballots challenged only on that ground be opened and counted. In support of its Motion, the Petitioner alleges that none of the strikers charged with "debarment" activity had been discharged, replaced, disciplined or denied reinstatement prior to the election. The Employer thereafter filed a statement contending that the Petitioner's motion is unsupported in either law or fact.

Upon full consideration of the issues raised by the motion, the Board is of the opinion that there is merit to the contention of the Petitioner. Employees who engage in an economic strike retain their status as employees during the course of the strike, absent some affirmative

[2] Hearing was also recommended as to 2 individuals alleged to be watchmen excluded from the unit and as to 3 individuals whose eligibility was challenged on the sole ground that they had obtained permanent employment elsewhere prior to the election.

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action which severs that relationship.[3] This severance may be accomplished by act of the employee himself, by securing permanent employment in another job, or may be accomplished by the employer through a lawful discharge or refusal to reinstate the striking individuals. Finally, it may be accomplished through the direct mandate of the statute.[4] If this status as an employee, albeit one out on strike, has not been ended through one of these means by the date of the election, the individual is entitled to cast a ballot for the selection of a bargaining representative, unless, as the statute provides, he is then a striker not entitled to reinstatement.

This concept of the continuing employee status of strikers is consistent with the terms of Section 9 (c) (3) of the amended Act. That section provides, in part, that "employees on strike who are not entitled to reinstatement shall not be eligible to vote". What was sought to be accomplished through this provision is shown clearly and unmistakably by its legislative history. Thus, the Senate Committee on Labor and Public Welfare in discussing S. 1126, which, with a minor variance, contained the same provision, stated:[5]

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[3] Section 2(3) of the Act states, in part, that "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . .".

[4] Section 8 (d) of the Act provides that employees who strike, under certain specified circumstances during the 60 day period prior to the expiration date of a collective bargaining contract, may automatically lose the status of employees.

[5] *Senate Report No. 105, 80th Congress.* While the Report was on S. 1126, this bill differed with respect to Section 9(c)(3) of the Act as finally enacted only by addition of the words "unless such strike involves an unfair labor practice on the part of the employer." The House Conference Report No. 510, on H. R. 3020 noted that "The Senate amendment [as to Section 9(c)(3)] also contained a provision that employees on strike who were not entitled to reinstatement should not be permitted to vote unless the strike involved an unfair labor practice on the part of the employer. This provision is also included in Section 9(c) of the conference agreement with the 'unless' clause omitted. The inclusion

> "When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*N.L.R.B.* v. *Mackay Radio,* 304 U.S. 333). It appears clear that a striker having no right to replacement should not have a voice in the selection of a bargaining representative, and the committee bill so provides."

Prior to the enactment of this provision in the Labor Management Relations Act of 1947, the Board had held that both strikers and replacements could vote in Board conducted elections.[6] With the intent of preventing two votes being cast for one job, the Congress changed this rule by the quoted provision in Section 9 (c) (3), and directed that strikers whose jobs had been permanently filled by replacements were ineligible to vote.

The Employer herein, in supporting the challenges to the ballots of the 82 individuals charged with "debarment" activity, apparently contends that a striker who engages in violent or illegal conduct during a strike automatically becomes ineligible for reinstatement, and thereby immediately loses the status of an employee without the Employer's having taken affirmative action. We do not agree. In situations where strikers have engaged in conduct of such a character as to render them unsuitable for re-

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of such clause would have had the effect of precluding the Board from changing its present practice with respect to the treatment of 'unfair' labor practices' strikers as distinguished from that accorded to 'economic' strikers." For further comments indicating the intent of Section 9(c)(3) as being restricted to ineligibility of permanently replaced economic strikers, see the comments of Senator Taft, *Congressional Record, 80th Congress,* pps. 3954, 3955.

[6] See *Columbia Pictures Corporation,* 64 NLRB 490, and cases cited therein.

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employment *and have been discharged or denied reinstatement by the employer,* the Board has declined to order that reinstatement be made by the employer.[7] Where no such discharge or denial of reinstatement takes place, however, or where it occurs after the eligibility date of the election has passed, the individual, as an employee whose status has not been altered or challenged as of the election date, is clearly entitled to vote. Absent discharge or refusal of reinstatement prior to the eligibility date, testimony as to activities which *might* have provided a basis for such action on the part of the Employer is clearly irrelevant and immaterial in a hearing on challenged ballots.

Accordingly, we shall grant the Petitioner's motion to exclude testimony, at any hearing on challenged ballots in this proceeding, as to alleged "debarment" activity on the part of strikers who were not discharged or denied reinstatement by the Employer prior to the date of the election of June 25, 1952. The Regional Director's Report on Challenges, however, does not show conclusively whether or not the 82 individuals whose ballots were challenged on "debarment" activity grounds had been discharged or denied reinstatement prior to the eligibility date.[8] We shall therefore direct that the hearing on challenged ballots originally directed, be deferred, and that this proceeding be remanded to the Regional Director for an appropriate supplemental report on challenges consistent with our ruling regarding the question of alleged "debarment" activities.

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[7] See *Kansas Milling Co.*, 86 NLRB 925; *E. A. Laboratories, Inc.*, 80 NLRB 625 at 696; *Deena Artware, Incorporated*, 86 NLRB 732, enforced as modified, (C.A. 6), 198 F. 2d 645.

[8] The Regional Director's Report on Challenges states that no replacements for strikers were hired since the beginning of the strike. The Petitioner states in its motion that none of the strikers had been discharged and that none of the challenged voters had requested reinstatement. No contrary statement is noted in the Report on Challenges but the Employer's answer to the instant motion alleges that the "motion is unsupported by either fact or law."

ORDER

IT IS HEREBY ORDERED that the hearing on challenged ballots previously directed in this proceeding be postponed indefinitely; and

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for the Fifth Region for the purpose of preparation and issuance of a Supplemental Report on Challenges.

Dated, Washington, D. C., Dec. 12, 1952

PAUL M. HERZOG, *Chairman*
ABE MURDOCK, *Member*
PAUL L. STYLES, *Member*
IVAR H. PETERSON, *Member*
National Labor Relations Board

(SEAL)

* * * * * * * * * *

Second Supplemental Decision and Direction. 102 N.L.R.B. 1626

On December 12, 1952, the Board issued a Supplemental Decision and Order in the above-entitled proceeding,[1] directing that testimony be excluded at any hearing on challenged ballots in this proceeding as to alleged "debarment" activity on the part of strikers not discharged or denied reinstatement prior to the date of the election conducted herein. The Board further directed that the proceeding be remanded to the Regional Director for the Fifth Region for the preparation of a Supplemental Report on Challenges in accord with this ruling.[2]

On January 9, 1953, the Regional Director issued such Supplemental Report finding that none of the strikers

[1] 101 NLRB No. 181.

[2] On December 18, 1952, counsel for the Employer filed "Exceptions to Supplemental Decision and Order", and requested that it be vacated. The Board considered these exceptions in the nature of a Motion for Reconsideration and, on December 30, 1952, denied the Motion.

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whose eligibility is challenged herein were permanently replaced, discharged, or denied reinstatement by the Employer prior to the date of the election. Consistent with the Board's Supplemental Decision and Order, the Regional Director therefore recommended that the challenges to 59 ballots contested by the Employer solely upon the grounds of "debarment activity" be overruled and the ballots be opened and counted.

Twenty-three additional ballots were challenged by the Employer on the ground that the individuals concerned had secured permanent employment elsewhere, as well as engaged in "debarment" activity. The Regional Director found, on investigation, that 15 of these individuals had not obtained regular and substantially equivalent employment elsewhere at the time of the election, and recommended that the challenges to these 15 voters be overruled and that their ballots be opened and counted. He found that 2 individuals challenged by the Employer had obtained permanent employment away from the Employer's plant at the time of the election and recommended that the challenges to their ballots be sustained. The Regional Director also found that there was insufficient evidence or issues of fact or credibility as to the eligibility status of 6 other voters challenged by the Employer as having obtained permanent employment elsewhere, and recommended that a hearing be held as to the eligibility of these individuals.

With respect to other challenges, the Regional Director recommended that a hearing be held as to 2 employees who the Employer contends are watchmen and excluded from the unit; that a hearing be held as to the status of 2 individuals challenged by the Petitioner as having secured permanent employment away from the plant at the time of the election; and that the ballot of one individual challenged by both the Employer and the Petitioner on the ground of permanent employment elsewhere be sustained.

On January 19, both the Employer and the Petitioner filed timely exceptions to the Regional Director's Supplemental Report. The Petitioner excepts to the Regional

Director's finding and recommendation that Ruth V. Grumbine was ineligible at the time of the election because she had secured permanent employment elsewhere. The Regional Director found that Grumbine had been employed since on or about May 30, 1952, a date preceding the date of election herein, as a sales clerk at $30-$32 per 48 hour week and had informed her new employer when hired that she was a striker who would "probably not go back". The Petitioner contends that a hearing should be directed as to the eligibility status of Grumbine. We do not agree and, on the contrary, adopt the finding and recommendation of the Regional Director. The Petitioner also excepts to the Regional Director's recommendation that a hearing be held as to the eligibility status of Clifford A. Stitley, Charlotte A. Stull, Mildred L. Blank (Gray) and Helen B. Wisner. In the case of each of these individuals there is conflicting evidence as to whether or not they have obtained permanent employment elsewhere or had done so at the time of the election. Accordingly, we adopt the recommendation of the Regional Director.

The Employer excepts to the entire Supplemental Report on Challenges insofar as it is adverse in findings and recommendations on the challenges urged by the Employer. More specifically, the Employer reiterates its previous contention that Section 9(c)(3) in providing that "employees on strike who are not entitled to reinstatement shall not be eligible to vote" voids the ballots of those individuals herein challenged on "debarment" activity. As we have previously considered and overruled this contention for reasons set forth at length in the Supplemental Decision and Order, we find no merit in the Employer's exceptions on that ground.[3] The Employer also excepts to that por-

[3] The Supplemental Decision and Order at two points refers to the "eligibility date of the election" rather than the date of the election itself. For purposes of clarity, that Decision is herewith amended to read, in the text following footnote 7, "Where no such discharge or denial of reinstatement takes place, however, or where it occurs after the date of the election has passed the individual,

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tion of the Regional Director's Supplemental Report insofar as it recommends overruling the challenges to the ballots of those employees whom the Employer contends had obtained permanent employment elsewhere at the time of the election. The Regional Director's Report notes that the Employer was requested by him to present all evidence upon which it relied to support the allegation as to these individuals and failed to do so. No such evidence is presented in the exceptions. Accordingly, as we find that the disposition by the Regional Director of the challenges to these ballots is supported by the facts disclosed by his investigation we adopt the findings and recommendations thereon contained in the Supplemental Report on Challenges.

In view of the foregoing, the Board finds that the exceptions of the Employer and the Petitioner to the Supplemental Report on Challenges do not raise substantial or material issues of fact as to the Regional Director's findings and recommendations. The Regional Director recommended that a hearing be held, if necessary, to resolve the questions of fact and credibility in the case of 10 voters whose ballots were challenged. However, we find it unnecessary to order such a hearing at this time as a conclusive election may result from the opening and counting of the 95 ballots found valid herein and in the original Report on Challenges.[4] We shall therefore direct that those ballots, challenges to which have been overruled, be opened and counted.

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as an employee whose status has not been altered or challenged as of the election date, is clearly entitled to vote. Absent discharge or refusal of reinstatement prior to the election date, testimony as to activities which might have provided a basis for such action on the part of the Employer is clearly irrelevant and immaterial in a hearing on challenged ballots."

[4] The Board on October 2, 1952, in the absence of exceptions by either party adopted the recommendation of the original Report on Challenges that the challenges to 21 ballots be overruled. One hundred and fifty-seven ballots were cast in the election.

Direction

It Is Hereby Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Union Manufacturing Company, Frederick, Maryland, the Regional Director for the Fifth Region shall, pursuant to National Labor Relations Board Rules and Regulations, within ten (10) days from the date of this Direction, open and count the ballots of

Anna May Cline
Ella Toms
Kenneth Blake
Leslie S. Holt, Jr.
Ollie C. Bridges
Mary Ellen Summers
Raetta M. Belcher
Elsie M. Cover
William E. King
Charles E. Michael
Grayson L. Young
Helen Abrecht
Ruth Powell
Maud Aylor
Ira N. Ramsburg
Leona J. Cline
Margaret D. Miller
Miriam P. Flair
Robert E. Bell
Floyd W. Haines
Alva O. Michael
Kohlman F. Miller
Anna Adams
Grace Angleberger

Bruce Aumen
Louis W. Aylor, Jr.
Robert A. Babington
Elizabeth Best
Doris Boone
Joseph A. Bowers, Jr.
Helen Burdette
Catherine Carlisle
Lillie Jane Cline
Mildred Corum
Howard R. Damuth
Agnes De Grange
Eva Fagan
Frances E. Fox
Nelson L. Grey
Dorothy Harris
Loretta Himes
Adeline P. Jones
William H. Koontz
Emma Aumen
Vernon Baer
Robert T. Baumgardner
Chester Blank
Mehrl Bopst
Betty Brunner
Betty Butler
Lee Cline
Pauline Cole
Ruth Boone
Morris Damuth
Charlotte Droneburg
Austin G. Fisher
Gertrude Glass
Barbara Hane
Paul Hildebrand
Melton Holt
Edward B. Jones, Jr.
William J. Koontz

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Jack Lydard
Mildred Myers
Dorothy W. Orndorff
Elizabeth Powell
Carl Ridgley
Hilda Shank
Blanche Tracey
Jacob D. Weatherholt
Jean M. Yeager
Estelle M. Baker
Mary K. Burrier
George Franklin Freed
Charles H. Hahn
George W. Harris
Barbara S. Koontz
Mehrl L. Murphy
Martin L. Wachter, Jr.
James E. May
Martha O'Brien
Dorothy Owens
Melvin Riddle
Joyce Rippeon
Ruth Stupp
Thomas B. Wainwright
Carrie White
Irene Zimmerman
Frances C. Blinkenstaff
Ellen E. Freed
Edward L. Gray
Frances C. Hardman
Oscar P. Johnson
Pauline F. Kreh
Mary A. Staley

and thereafter prepare and cause to be served upon the parties a supplemental tally of ballots, including therein the count of the challenged ballots.

Signed at Washington, D. C., Feb. 24, 1953.

PAUL M. HERZOG, *Chairman*
ABE MURDOCK, *Member*
PAUL L. STYLES, *Member*
IVAR H. PETERSON, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Decision and Order. 107 N.L.R.B. No. 61

STATEMENT OF THE CASE

Upon a charge filed on April 21, 1953, by American Federation of Hosiery Workers, AFL, herein termed the Union, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel and the Board, by the Acting Regional Director for the Fifth Region, issued a complaint dated April 30, 1953, against Union Manufacturing Company, herein

termed the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing, were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent (1) on or about April 13, 1953, and at all times thereafter, has continuously failed and refused to bargain collectively in good faith with the Union as the exclusive representative of its employees in an appropriate unit, although the Union had been certified as the representative of the employees in such unit on March 17, 1953; and (2) such acts and conduct constitute unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Thereafter, on July 9, 1953, all the parties entered into a stipulation setting forth an agreed statement of facts. The stipulation further includes provisions that (1) The stipulation and attached exhibits, together with the charge, complaint, notice of hearing, answer of Respondent, affidavits of service of the charge, complaint, notice of hearing, and the entire record in the *Matter of Union Manufacturing Company*, Case No. 5-RC-1103, shall constitute the entire record herein and shall be filed with the Board; (2) the affidavits, correspondence, and other documents attached to Respondent's answer as Exhibits 1 to 7 inclusive have been made part of the answer by Respondent for the limited purpose of affording the Respondent an opportunity to show the nature of the issues on which Respondent asserts it was entitled to a hearing in the proceeding known as *Matter of Union Manufacturing Company*, Case No. 5-RC-1103, and further to show that material and substantial issues of fact were raised which necessitated a hearing prior to the counting of certain challenged ballots to determine the eligibility of all

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challenged voters, and said documents are not made part of the record for the purpose of proving that the matters recited therein are true in fact; (3) the parties waive the taking of further testimony, or the submission of further evidence, or any hearing or further hearing before any Trial Examiner, Examiner or Member of the Board, the issuance of any intermediate or proposed report or proposed order, and the filing of exceptions to any such intermediate or proposed report or proposed order; (4) the parties waive all further hearing, taking of testimony, submission of evidence, oral argument or other procedure before the Board, provided that the parties might file, within a stated period, briefs with the Board. A memorandum brief was thereafter filed with the Board by the Respondent.

The aforesaid stipulation is hereby accepted and made a part of the record herein, and, in accordance with Section 102.50 of National Labor Relations Board Rules and Regulations—Series 6, as amended, the proceeding is hereby transferred to, and continued before, the Board. Upon the basis of the aforesaid stipulation and the entire record in the case, and upon full consideration of the Respondent's memorandum, the Board makes the following:

Findings of Fact

I. The business of the Respondent

Respondent is a corporation duly organized and existing by virtue of the laws of the State of Maryland, having its principal office and place of business at Frederick, Maryland, where it is engaged in the manufacture, sale, and distribution of full-fashioned hosiery. In the course of its buisness operations, the Respondent annually purchases materials and supplies valued in excess of $100,000, all of which originates in and is shipped from States other than the State of Maryland to the Frederick plant. Respondent annually sells and delivers substantially all of its finished products, valued in excess of $100,000,

to purchasers in States other than the State of Maryland.

The Respondent admits, and we find, that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. The labor organization involved

The Union, affiliated with the American Federation of Labor, is a labor organization within the meaning of the Act.

III. The unfair labor practices

A. *The refusal to bargain*

1. The representation case

On or about May 4, 1952, an economic strike commenced at the Respondent's Frederick, Maryland, plant. On June 4, 1952, the Union filed with the Board it petition for certification of representatives in the unit described below, and, on June 12, the Board issued a Decision and Direction of Election containing the provision that "all persons hired since the commencement of the strike and all strikers shall be presumptively eligible to vote, subject to challenge".[1] The election thus directed was held on June 25 under the direction and supervision of the Regional Director for the Fifth Region. The tally of ballots showed that 157 votes were cast, of which one was for the Union, 46 were against the Union, and 110 were challenged. The strike was still current at the time of the election.

Thereafter, on September 12, 1952, the Regional Director issued his Report on Challenges in which he recommended that the challenges to 21 ballots be overruled, that 2 challenges be sustained, and that a hearing be conducted with respect to the issues raised by the remaining 87 challenged ballots. The Respondent contested the

[1] Case No. 5-RC-1103, Original Decision and Direction of Election not reported in printed volumes of Board decisions.

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eligibility of 82 of these 87 voters on the ground that they had engaged in "debarment activity" on the picket line prior to the election and contended that this activity automatically placed these individuals in the category of employees not entitled to reinstatement. As a further disqualification with respect to 23 of the 82, the Respondent contended that these individuals had obtained permanent employment with another employer prior to the election. As no exceptions were filed to the Report on Challenges, the Board, on October 2, 1952, adopted the recommendations and ordered that a hearing be held.

Thereafter, and prior to the commencement of any hearing, the Board issued a Supplemental Decision and Order[2] wherein, on motion of the Union, it directed that testimony be excluded from the hearing concerning alleged "debarment activity" on the part of strikers who were not permanently replaced, discharged, or denied reinstatement prior to the date of the election. The Board further directed that the Regional Director prepare a Supplemental Report on Challenges in accord with such ruling. On January 9, 1953, the Regional Director issued such Supplemental Report finding that none of the strikers whose eligibility was challenged had been permanently replaced, discharged or denied reinstatement prior to the date of the election and recommending that the challenges to the 59 ballots contested by the Respondent solely upon the grounds of "debarment activity" be overruled and that the ballots be opened and counted. The Regional Director further recommended overruling challenges to 15 other ballots contested both on the ground that these employees had engaged in "debarment activity" and on the ground that these employees had secured other permanent employment prior to the election. Both the Respondent and the Union filed timely exceptions to the Supplemental Report on Challenges.

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[2] 101 NLRB No. 181.

On February 24, the Board issued its Second Supplemental Decision and Direction[3] finding that the exceptions did not raise substantial and material issues of fact as to the Regional Director's findings and recommendations and directing that those ballots to which challenges had been overrruled should be opened and counted. Pursuant thereto, the Regional Director issued his revised tally of ballots on March 6, which tally showed that the Union had obtained a majority of the valid votes cast. On March 10, counsel for the Respondent filed objections to the opening and counting of the challenged ballots. On March 17, the Board overruled the objections and certified that the Union, purusant to Section 9 (a) of the Act, was the exclusive representative of all the Respondent's employees in the unit described below for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The appropriate unit

The parties agree, and the Board finds, that all production and maintenance employees at the Respondent's Frederick, Maryland, plant, excluding office clerical employees, watchmen, professional employees and all supervisors as defined in the amended Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Representation by the Union of a majority in the appropriate unit

As previously indicated, the Board, on March 17, 1953, certified the Union as exclusive bargaining representative in the appropriate unit of the Respondent's employees. The Respondent contests the validity of this certification herein, as it did in the representation case, on the ground

[3] 102 NLRB No. 176.

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that the Board should have held a hearing concerning the allegations of "debarment activity" on the picket line by a substantial number of the challenged voters whose ballots were, instead, opened and counted. The Board considered this contention and Respondent's supporting arguments in the representation case resulting in the certification and found the contention to be without merit inasmuch as the Respondent had not, in fact, discharged permanently replaced, or refused to reinstate any of the challenged voters prior to the date of the election. The Respondent offers, and we find, no additional evidence or contention not considered in the prior representation matter which would support the Respondent's position.

Accordingly, we find that on March 17, 1953, and at all times thereafter, the Union was and now is the exclusive bargaining representative of the employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

4. The refusal to bargain

The parties stipulated that by letter mailed on or about April 9, 1953, the Union requested a meeting with representatives of the Respondent for the purpose of reaching a collective bargaining agreement. The parties also stipulated that, on or about April 13, 1953, the Respondent replied to the Union's request stating that it declined to recognize the certification of the Union as the representative of its employees. The Respondent's contention that the certification was invalid has been decided adversely to the Respondent herein. Accordingly, we find that the Respondent, on or about April 13, 1953, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of employees of the Respondent in an appropriate unit in violation of Section 8 (a) (5) of the Act, and has thereby interfered with,

restrained, and coerced its employees in the exercise of their statutory rights in violation of Section 8 (a) (1).

IV. The effect of the unfair labor practices

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce.

V. The remedy

Having found that the Respondent is engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action which will effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, the Board makes the following:

Conclusions of Law

1. American Federation of Hosiery Workers, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production and maintenance employees at the Respondent's Frederick, Maryland, full-fashioned hosiery plant, excluding office clerical employees, watchmen, professional employees and all supervisors as defined in the amended Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. American Federation of Hosiery Workers, AFL, was on March 17, 1953, certified as, and has at all times thereafter been, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

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4. By refusing on or about April 13, 1953, and at all times thereafter, to bargain collectively with American Federation of Hosiery Workers, AFL, as the exclusive representative of all employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By the aforesaid unfair labor practice, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Union Manufacturing Company, Frederick, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Hosiery Workers, AFL, as the exclusive representative of all production and maintenance employees at the Respondent's Frederick, Maryland, full-fashioned hosiery plant, excluding office clerical employees, watchmen, professional employees and all supervisors as defined in the amended Act;

(b) In any other manner interfering with the efforts of American Federation of Hosiery Workers, AFL, to

negotiate for, or to represent, the employees in the aforesaid bargaining unit as their exclusive bargaining agent.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with American Federation of Hosiery Workers, AFL, as the exclusive representative of the employees in the aforesaid bargaining unit, with respect to rates of pay, wages, hours, and other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement;

(b) Post at its plant in Frederick, Maryland, copies of the notice attached hereto marked "Appendix A".[4] Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Fifth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Signed at Washington, D. C., November 25, 1953

GUY FARMER, *Chairman*
ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
PHILIP RAY RODGERS, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER".

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12021

UNION MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Request for Enforcement of an Order of the National Labor Relations Board

Decided January 14, 1955

Mr. John R. Fitzpatrick, with whom *Mr. Edward J. Lynch* was on the brief, for petitioner.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the Bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of Court, with whom *Mr. A. Norman Somers,* Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a petition for review of an order of the National Labor Relations Board. The Board had found that the Company, our petitioner, had committed an unfair labor practice within the meaning of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act as amended,[1] in refusing to bargain

[1] 61 STAT. 140 (1947), as amended, 29 U.S.C.A. § 158(a)(1) and (5).

with a union certified by the Board after an election.

The facts were stipulated, and the question before us is a question of law, one of statutory construction. A strike occurred at the Company's plant. It is agreed that it was an economic strike. While it was in progress the American Federation of Hosiery Workers, A.F.L., requested the Company to recognize the Federation as the bargaining representative of the employees. An election was held. When certain strikers appeared to vote, the Company challenged their votes. There were enough challenges to affect the result of the election, and the Company refused to bargain with the union selected by counting the challenged votes. The Board considered the challenges and at first ordered a hearing but then, without a hearing, overruled them. This is the order under review.

The challenges were upon the ground that the strikers involved had been guilty of strike misconduct and so were not entitled to vote under a specific provision of the statute. Affidavits submitted to the Board were said to establish the facts of misconduct. These strikers had not been discharged by formal action of the Company, and they had not been replaced or denied reinstatement.

The statute contains this sentence:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."[2]

The question before us is the meaning of the foregoing sentence.

The Company says that it is established that strikers who engage in misconduct are not eligible for the protection of the Act and are not entitled to an order of reinstatement (citing cases), that the purpose of the statute is industrial peace, and that the disputed sentence means precisely what it says. The Company says that discharge

[2] Sec. 9(c)(3) of the National Labor Relations Act as amended, 61 STAT. 144 (1947), 29 U.S.C.A. § 159(c)(3).

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or replacement of these strikers was a matter for managerial discretion in the Company and that the employees were not "entitled" to either. It says that any employee who is not qualified for the protection of the Act—by reason of discharge, replacement, or because he is subject to denial of reinstatement—is "not entitled to reinstatement" and so, according to the Act, is not entitled to vote. It says that to hold that an employer must take an affirmative action of discharge or replacement, and thus must subject itself to charges and claims for damages, is to impose upon an employer a burden clearly not contemplated by this provision of the Act. It says, moreover, that, if actual discharge or replacement is the sole criterion of eligibility to vote, the employer has control in a major way over the election. It says that the purpose of the disputed sentence is to limit eligible voters to those employees who have not forfeited their rights to reinstatement. The gist of the Company's contention is that the disputed sentence creates a special class of strikers, consisting of those who by their acts of misconduct have forfeited their rights to protection under the statute and so are ineligible to vote. The Company relies upon the literal reading of the sentence.

The Board says that the basic criterion for eligibility to vote is whether the voter will be affected by the election; that if it be clear that an employee will not be affected—*i.e.*, if he has been discharged or replaced—he cannot vote; otherwise he is eligible. It says that any economic striker can be denied reinstatement for any nondiscriminatory reason and that the phrase "not entitled to reinstatement" could not reasonably be held to refer to all economic strikers. It says that a striker who engages in misconduct does not automatically forfeit reinstatement, he merely supplies a ready reason for his employer's action. If the employer chose not to replace these strikers and they were ultimately reinstated after being denied a vote, they would thereafter be represented

by an agent not of their choosing. It says that prior to the insertion of the disputed sentence in the statute both employees who had been replaced and their replacements could vote by well-established rules of the Board and that the sole purpose of the sentence was to eliminate this unseemly duplication. It says that the sentence means that strikers actually discharged or replaced, and so in a real and actual sense not entitled to reinstatement, cannot vote.

In the light of these opposing contentions we think the disputed sentence is ambiguous. On the face of it both contentions have reasonable support. Since the sentence upon its face is ambiguous we turn to the legislative history to try to ascertain its meaning from its purpose.

That portion of Section 9(c)(3) with which we are concerned was not in the bill initially passed by the House of Representatives.[3] It first appeared in the version of the bill as reported to the Senate by its Committee.[4] Thereafter a unanimous consent agreement was reached in the Senate, providing that the House bill be amended by substituting the text of the Senate bill as amended.[5] The sentence then contained a clause "unless such strike involves an unfair labor practice on the part of the employer."[6] Following passage in the Senate the bill went to conference, where the "unless" clause was deleted and the form now before us adopted.[7]

From this legislative history it is apparent that the

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[3] H.R. 3020, 80th Cong., 1st Sess. § 9(c)(3) (1947), 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, p. 59 (G.P.O. 1948) (hereafter cited as LEG. HIST.).

[4] S. 1126, 80th Cong., 1st Sess. § 9(c)(3) (1947), 1 LEG. HIST. 119.

[5] 93 CONG. REC. 4999, 5117 (1947), 2 LEG. HIST. 1468, 1522.

[6] H.R. 3020 (with amendments of Senate), 80th Cong., 1st Sess. § 9(c)(3) (1947), 1 LEG. HIST. 246.

[7] H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 49-50 (1947), 1 LEG. HIST. 553-4.

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discussion in the Senate reflects the Congressional understanding of the legislative purpose. The Senate Report stated:

> "When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*NLRB* v. *Mackay Radio*, 304 U.S. 333). It appears clear that a striker having no right to replacement [*sic*] should not have a voice in the selection of a bargaining representative, and the committee bill so provides."[8]

In the *Mackay Radio* case a strike by all the workers was staged in a branch office of a communications company. In order to maintain service the company imported employees from its other offices to fill the strikers' places. After the strikers returned to work, five of the imported workers desired to remain, so the company notified five strikers that the roll of employees was complete and they would not be reinstated. The Supreme Court held that the replaced strikers had no right to reinstatement provided there was no discrimination exercised against employees because they had been active in the union. That case involved an affirmative act by the employer—replacement,—and its citation in the Senate Report is an indication that the Senate had that situation in mind. Senator Taft, Chairman of the Committee which reported the bill, discussed on the floor of the Senate the sentence now before us. He used as an example a case in California, where strikers had been out eighteen months and had gradually been replaced. Even though the replaced strikers were working on new jobs elsewhere, they cast votes in an election of a bargaining agent at their former place

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[8] SEN. REP. No. 105, 80th Cong., 1st Sess. 25 (1947), 1 LEG. HIST. 431.

of employment. Thus the employer was left helpless to stop the strike, because he could deal only with the union representing men who were no longer in his employ. Senator Taft stated that this bill was designed to end this sort of situation by providing that former employees cannot vote in an election.[9]

One of the authors of the Senate Minority Report on this bill attacked the provision and asked for an interpretation. A member of the majority of the Committee replied and cited a situation where "the individuals who were on strike and whose jobs had been filled, and who were not entitled to reinstatement, swung the election and decided the bargaining agent. There was the ridiculous situation of a thousand persons voting for a bargaining agent for only 500 jobs. That does not make sense. All the amendment does is to say that only employees, who under present rules are on strike and entitled to reinstatement, can vote to select the bargaining agent."[10]

This same majority member, Senator Ball, later made a radio speech, printed in the Congressional Record, in which he interpreted the provisions as follows:

> "Section 9 of the National Labor Relations Act, which deals with election of bargaining representatives, is completely rewritten in the pending bill, with every change * * * designed to assure to employees, not employers, their full rights and freedoms.
>
> "Briefly, those changes * * * (5) [provide] that when an election is held during a strike, only employees working or entitled to reinstatement may vote. The Board at present permits strikers who have been replaced and have no legal right to reinstatement to vote, and in effect, block the free choice of the real employees."[11]

[9] 93 Cong. Rec. 3838-9 (1947), 2 Leg. Hist. 1014.

[10] 93 Cong. Rec. 4196 (1947), 2 Leg. Hist. 1102.

[11] 93 Cong. Rec. A2252-3 (1947), 2 Leg. Hist. 1525.

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It thus appears that both majority and minority members of the Senate Committee sponsoring the bill interpreted the provision in the same way.[12] There is no helpful legislative history on the House side.

Upon the basis of the history of the sentence here in controversy, we think it clear that its purpose was to make ineligible strikers whose reinstatement rights had already been destroyed by the employer's action and who were for that compelling reason ineligible for reinstatement at the time of the election. Such being its legislative intent, and the sentence being otherwise ambiguous, we hold that to be its meaning.

We are in accord here with the authorities which require great weight to be given an administrator's interpretation of the statute he is directed and empowered to administer.[13]

Our dissenting judge would give controlling weight to the purpose and policy of the statute. He says, correctly, that this purpose and policy is the preservation of peace in industry-labor relations. We do not agree with his estimate of the restraining effect on striking employees of a threat of denial of voting rights. The employer has a right to discharge employees who misconduct themselves. We think a mere denial of a vote in a bargaining agent election would add little, if anything, to the deterring effects of the employer's right to discharge. If an employee is not deterred from violence by the risk of discharge, it seems unlikely that he would be deterred because he might not be allowed to vote in the election.

We think the challenges here involved were not valid as a matter of law. It follows that the order of the Board must be sustained. An order of enforcement will be entered.

Affirmed.

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[12] See 93 Cong. Rec. 6527 (1947), 2 Leg. Hist. 1606.

[13] Unemployment Comm'n v. Aragon, 329 U.S. 143, 91 L. Ed. 136, 67 S. Ct. 245 (1946), and cases there cited; Brooks v. National Labor Relations Board, 23 U.S.L. Week 4038 (U.S. Dec. 6, 1954).

DANAHER, *Circuit Judge,* dissenting: Section 9(c)(3) of the National Labor Relations Act, as amended,[1] provides in part: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote." The Board construed this language to mean that strikers who had engaged in unlawful strike misconduct, characterized as debarring activities, were nonetheless eligible to vote if, prior to the election, they had not been discharged or replaced. A number of such strikers, sufficient to affect the result of the election, were permitted to vote despite the employer's objections. The Board rejected the employer's contentions as a matter of law and, without a hearing, ordered the employer to bargain collectively with the union. The Board's conclusion rests solely on its interpretation of one paragraph of the statute and not on matters within its own special competence.[2] Thus, it is for the court "to determine what the governing principle is." *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953). I would remand the case to the Board for a hearing on the merits of the employer's objections.[3] From the employer's charges, which for present purposes must be accepted, the issue may be highlighted.

About March 4, 1952, certain employees began a strike which was not the result of an unfair labor practice. On March 12, 1952, a union requested and was refused recognition by the employer. Over the next several months, it may be gathered from the charges, tempers rose, strife developed, and the employees whose voting rights are here challenged were charged with debarment, violence, mass picketing, and generally lawless conduct on the picket line. While the strike was still in progress, on June 25, 1952 a representation election was held among

[1] 61 STAT. 143 (1947), as amended, 29 U.S.C. § 159(c)(3) (1952).

[2] Cf. Brooks v. Labor Board, 348 U.S. (1954).

[3] The Board concedes that the employer's affidavits establish a showing of strike misconduct on the part of each of the challenged voters sufficient to warrant a hearing on the merits, if it be assumed that the Board misconstrued the law.

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all the company's employees. The Board determined that a majority of valid ballots had been cast for the union although the vote might have been otherwise if the Board had recognized the claimed ineligibility of the "misconduct" strikers.

Various contentions of the employer and of the Board have been summarized in the majority opinion, but the employer really claims that under Section 9(c)(3), no affirmative action by the employer is necessary to disqualify a striker whose own misconduct has worked a forfeiture of his status as a voter. Cited are numerous cases which hold "that strikers who have engaged in unprotected conduct and have been discharged or denied reinstatement by the employer are not entitled to an order of reinstatement."

The Board, on the other hand, argues that the employer is required to exercise whatever discharge rights he may have under the circumstances, and, in reliance upon Section 2(3) of the Act[4] the Board contends that a striker who engaged in unlawful conduct remains an employee until the employer " 'affirmatively exercises his option to terminate the relationship, either by discharging the strikers or refusing reinstatement.' "[5] The Board grants that if the "misconduct" striker had been discharged or replaced *before* the election, he would not have been affected by the election and, hence, would not have been entitled to vote.

Both parties fall short of the real point at issue, in my appraisal. Both completely subordinate the public interest in the peaceful and orderly settlement of organizational questions. Both approach the problem as though nothing were involved but the private relationship between the company and its employees. We should look to the objectives of the Act for our answer.

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[4] 61 STAT. 137 (1947), 29 U.S.C. § 152(3) (1952).

[5] The Board seems to confuse a Section 2(3) qualification of "employee" with qualifications of a *voter* if we have in mind the prescription of the Act as a whole.

The Act's purpose and policy are set forth in Section 1 [6] as follows: "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce. to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations . . . to define and proscribe practices on the part of labor and management which . . . are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." Accordingly, Section 7 declares the rights of employees as Section 8 prohibits interference with those rights by employers or labor unions alike. The right to organize or refrain from organizing is implemented by Section 9 of the Act. Therein is provided the election machinery for determining questions of union representation. That means, at least, a free election, a voluntary choice, by employees lawfully eligible to vote.

Granted, "the Board enjoys wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees." *Southern S.S. Co.* v. *Labor Board*, 316 U.S. 31, 37 (1942). But if it "is wholly reasonable to remove any possibility of intimidation by conducting the election in the absence of the employer's representatives," *Id.* at 37, what are we to say as to actual intimidation, if proved, by groups of "misconduct" strikers bent upon coercion? Can one doubt, as here charged, from the timing of the strike and the union's demand for recognition that the purpose of the contemporaneous and continued violence and concerted strike misconduct was to coerce the employer and the non-striking employees into acceptance of the union as bargaining agent? Can it reasonably be argued that a bargaining representative has been freely chosen if misconduct strikers by violence, as here charged, can be per-

[6] 61 STAT. 136 (1947), 29 U.S.C. § 141(b) (1952).

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mitted to cow their co-workers and at the same time be permitted by their own vote to determine the results of the election? If we are to say that unlawful conduct has no effect on the status of the strikers to select the bargaining agent for all, we put a premium on violent coercive action and reward the industrial strife the Act was designed to prevent. Cf. *N.L.R.B.* v. *Indiana Desk Co.*, 149 F. 2d 987, 995 (7th Cir. 1945).

The Board says, in effect, that the employer must act affirmatively in advance of the election and discharge or replace the misconduct strikers. Yet if the employer were so to act and make even an innocent mistake in imputing unlawful conduct to the wrong striking employee, the Board would impose upon him the unfair labor practice sanctions of Sections 8(a) (1) and (3) of the Act. *Industrial Cotton Mills* v. *N.L.R.B.*, 208 F. 2d 87 (4th Cir. 1953), *cert. denied*, 347 U.S. 935, (1954). Moreover, in such situations as we see presented here, what would we say if the Board should interpret termination notices as a precipitous discharge of the striking employees and accordingly hold there had been an attempt to interfere with the strike—another unfair labor practice? Cf. *Kansas Milling Co.*, 86 N.L.R.B. 925 (1949), *enforcement denied*, 185 F. 2d 413 (10th Cir. 1950); *United States Cold Storage Corp.*, 96 N.L.R.B. 1108 (1951), *enforced*, 203 F. 2d 924 (5th Cir. 1953), *cert. denied*, 346 U.S. 818 (1954). The Board upon a showing the force of which it here concedes, should not be permitted to shift to the employer, at the latter's real and substantial risk, its own responsibility to foster the orderly disposition of labor disputes.

On principle, and in view of the decisions, the proper course to be evolved seems clear. In the leading case of *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240, 257-8 (1939), the Supreme Court said:

> "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and

violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlement of disputes by providing legal remedies for the invasion of the employees' rights."

In *Victor Products Corp.* v. *N.L.R.B.*, 93 U.S. App. D.C. 56, 58, 208 F. 2d 834 (D.C. Cir. 1953), this court reemphasized the principle of the *Fansteel* case, saying: "The law which protects proper union activity, and therefore protects peaceful picketing, does not protect striking employees who forcibly debar other employees from entering the place of employment." The doctrine seems to me unchallengeable in its emphasis on the peaceful and lawful settlements of labor disputes envisaged by Section 1 of the Act.

The recent decision of the Supreme Court in *Brooks* v. *Labor Board,* 348 U. S. (1954), speaking through Mr. Justice Frankfurter, reinforces the priciples which should control. There, the Supreme Court sustained the Board's finding that the employer had committed an unfair labor practice, where one week after a Board election in which a bargaining representative was chosen, the employer attempted to support a majority of the employees who wrote a letter recanting the election decision. The Court criticized the employer for resorting to "self help" and suggested that his proper course was to take his problem to the Board. It is the Board's function—not the employer's—"to vindicate the rights of . . . employees to select their bargaining representative." Otherwise there is negation of the principle that "The underlying purpose of this statute is industrial peace." An attempt by the employer to arbitrate an organizational dispute "is not conducive to that end, it is inimical to it."[7] So

[7] An important passage from the Brooks case which gives setting to the current problem follows:

"Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks

here, under the Act, it is the function of the Board and, if need be, the courts, not of private employers, to secure the Act's public interest objectives. The Board's contention that the employer should have taken "affirmative" action is not only inconsistent with its position in the *Brooks* case, it is equivalent to shirking its own responsibility.

It is, of course, correct to say that one of the announced purposes of Section 9(c)(3) was to deal with the Board's previous practice of permitting both economic strikers and their permanent replacements to vote in representation elections despite the fact that the replacement had effected a constructive discharge of the striking employee. The language used by Congress does, indeed, meet that situation—but it is only one of the areas of impact. Also covered is the situation presented to us, particularly where in an entirety consistent fashion, Section 9(c)(3), without ambiguity, furthers achievements of the fundamental goal of resolving labor disputes in a peaceful and lawful manner. Legislators before now have announced

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to vindicate the rights of his employees to select their bargaining representative. If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board. If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention. The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

"We find wanting the arguments against these controlling considerations. . . ."

only one objective when they had yet others in mind.[8] "Legislative history" is no substitute for what the Act says—of what it permits—nor is it inevitably to be relied upon, *Ex Parte Collett*, 337 U.S. 55, 61 (1949), especially if it produces unreasonable or contradictory results. It is to be doubted in the absence of the "legislative history" relied upon, that the majority would urge that the literal language of Section 9(c)(3) should be read to create confusion where the provision is clear, especially when read against the objectives of the Act as a whole. See *Packard Co.* v. *Labor Board*, 330 U.S. 485, 492 (1947); *Gemsco Inc.* v. *Walling*, 324 U.S. 244, 260 (1945). I would expect that legislative history and rules of statutory construction "may not be used to create but only to remove doubt." *Russell Co.* v. *United States*, 261 U.S. 514, 519 (1923).

Accordingly we may assume that if Congress had intended only the limited result urged by the Board, it would have expressed itself more narrowly. Obviously the language of Section 9(c)(3) is much broader than would be necessary if its only purpose was to deny a ballot to replaced "economic" strikers. Hence, regardless of the fact that this specific problem may have given impetus to the enactment of Section 9(c)(3), I think we are required to give the section its natural application. *Cf. Feitler* v. *United States*, 34 F. 2d 30, 33 (3rd Cir. 1929), *affirmed*, 281 U.S. 389 (1930); *Labor Board* v. *Highland Park Co.*, 341 U.S. 322, 325 (1951).

In this view, where do we find ourselves? The majority says that Section 9(c)(3), contrary to the employer's contentions, is limited by legislative history. The Board says, in effect, that Section 2(3) means "once an employee, always an employee." Even as it concedes that a misconduct striker may be discharged, it argues for a

[8] "Under such circumstances, our duty as a court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." Vermilya-Brown Co. v. Connell, 335 U.S. 377, 388 (1948).

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result where he *must* be discharged if he is not to be permitted to participate in a representation election. It is my view that no such result is compelled, and quite the contrary, that an employee may remain an "employee" within Section 2(3) and still not be eligible as a voter. In short, the fundamental goal of orderly and peaceful resolution of labor organizational problems not only permits but impels a construction of the Act which draws a distinction between an employee, lawfully entitled to participate in all authorized proceedings, and an employee who, without having been discharged, may forfeit, by his own misconduct, a right to vote. Such a construction based upon the Act as a whole, need not rely merely upon Section 9(c)(3), yet is entirely consistent with my understanding of its import.

Restated, the sum of the Act, its objectives, its provisions and the cases construing them, so far as here pertinent, can be deduced thus: (1) Industrial strife can be avoided or substantially minimized if all concered recognize that none has the right to engage in acts or practices which jeopardize the public interest; (2) Employees have the right to join a labor organization or not, and to decide freely to have a bargaining representative or not; (3) It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their rights; (4) Employees who engage in a strike during a sixty-day "cooling-off" period are deprived of any right to participate in a representation proceeding; (5) Employees who engage in violent restraint or coercion may be discharged; (6) No Board order may issue to require the reinstatement of any employee who has been discharged for cause; (7) No such employee shall be entitled to reinstatement; (8) No employee who is not "entitled" to reinstatement shall be eligible to vote in a representation election; (9) A "valid" election when one is held may determine a bargaining representative for "all the employees" in an appropriate

unit; (10) A "valid" election is one free from fraud, from restraint or from coercion of employees in the exercise of their rights.

Thus the legislative scheme may be shortly discerned. If it be followed, employees lawfully entitled to vote and who have a substantial interest in the choice of a bargaining representative will be protected as and if they choose to participate in its selection. Concerted activities carried on in a lawful and orderly manner will be encouraged. Unlawful activity, on the other hand, will result in a forfeiture of voting privileges by those whose own misconduct has rendered them ineligible. This result seems eminently just and entirely compatible with principles of law and equity in other fields.

It is to be feared that a contrary conclusion will leave defenseless the public and non-participating employees and make a shambles of the peaceful objectives the Act seeks to attain. Is it too much to say that Congress expected no such result?

STATUTES, RULES AND REGULATIONS

National Labor Relations Act, as Amended, 61 Stat. 140 (1947), as Amended, 29 U.S.C. Supp. V, Secs. 151 et seq.

Section 1. (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate right in their relations with each other, and above all, recognize under law that neither party has any right in its relation with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful pro-

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cedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

"Sec. 2. (3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees

in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 9. (c)(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in

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the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

RULES AND REGULATIONS

National Labor Relations Board

Section 102.61 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to, and approval thereof by, the regional director, whose decision shall be final, have its name removed from the ballot. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of the ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such

filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to section 102.62, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections, challenges, or both, and shall prepare and cause to be served upon the parties a report on challenged ballots, objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D. C. Within 10 days from the date of issuance of the report on challenged ballots, objections, or both, any party may file with the Board in Washington, D. C., seven copies of exceptions to such report. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record, or may make disposition of the case.

The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

If exceptions are filed, either to the report on challenged ballots, objections, or both if it be a consolidated report,

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and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties, a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.56, 10257, and 102.58, insofar as applicable. Upon the close of the hearing, the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility, and containing findings of fact and recommendations to the Board, as to the disposition of the challenges or objections, or both, if it be a consolidated report. The agent conducting the hearing shall forward to the Board in Washington, D. C., the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objection to the conduct of the election or conduct affecting the results of the election, the report on such objections, the report on challenged ballots, and exceptions to the report on objections or the report on challenged ballots, and the record previously made, together with his report, if any, shall constitute the record in the case. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots, objections, or both, file with the Board in Washington, D. C., seven copies of exceptions to such report. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the regional director. Proof of service shall be made to the Board. If no exceptions are filed to such report the

Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record, or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.60.

In any such case in which the Board upon a ruling on challenged ballots, has directed the regional director to open and count such ballots and to issue a revised tally of ballots, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

STATEMENTS OF PROCEDURE

National Labor Relations Board

Sec. 101.18. (b) The consent election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, shall be the basis of a formal decision by the Board instead of an informal determination by the regional director. Thus, it is provided that the Board, rather than the regional director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and issues a report on the challenges instead of ruling thereon. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the regional director likewise conducts an investigation and issues a report instead of ruling upon the validity of the objections. In either event, the regional director's report is served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The Board then reviews the entire record

made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the regional director's report and take appropriate action in termination of the proceedings. If a hearing is held upon the challenged ballots or objections, all parties are heard, and, if directed by the Board, a report containing findings of fact and recommendations as to the disposition of the chanllenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D. C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the regional director. If the union has been selected as the representative, the Board or the regional director, as the case may be, issues its certification, and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the regional director, as the case may be, certifies that the union is not the chosen representative.

Sec. 101.20. (d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as has already been described in connection with the post-election procedures in cases involving consent elections to be followed by Board certifications.

Filed Jan. 14, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955
No. 12,021

UNION MANUFACTURING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Review and on Request for Enforcement of an Order of the National Labor Relations Board.

Before: Prettyman, Washington, and Danaher, Circuit Judges.

Decree

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is ordered by this Court that the order of the National Labor Relations Board on review in this cause be enforced, and that said order be, and the same is hereby, affirmed.

Pursuant to Rule 38(1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

Dated: January 14, 1955.

PER CIRCUIT JUDGE PRETTYMAN.

Separate dissenting opinion by Circuit Judge Danaher.

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Filed Feb. 7, 1955

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,021

UNION MANUFACTURING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Decree

Before: Prettyman, Washington and Danaher, Circuit Judges.

The National Labor Relations Board on November 25, 1953, issued an order against Petitioner, Union Manufacturing Company, its officers, agents, successors, and assigns. Subsequent thereto, on December 4, 1953, the Petitioner filed its Petition for Review of the Board's order and on January 12, 1954 the Board filed its answer and cross-petition for enforcement of said order together with the certified record. The Court heard argument of respective counsel on May 25, 1954 and has considered the briefs and the transcript of record filed in this cause. On January 14, 1955, the Court, being fully advised in the premises handed down its decision enforcing the said order. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that Petitioner, Union Manufacturing Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Hosiery Workers, AFL, as the exclusive representative of all production and maintenance employees at the Respondent's Frederick, Maryland, full-fashioned hosiery plant, excluding office clerical employees, watch-

men, professional employees and all supervisors as defined in the National Labor Relations Act, as amended;

(b) In any other manner interfering with the efforts of American Federation of Hosiery Workers, AFL, to negotiate for, or to represent, the employees in the aforesaid bargaining unit as their exclusive bargaining agent.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the National Labor Relations Act, as amended:

(a) Upon request, bargain collectively with American Federation of Hosiery Workers, AFL, as the exclusive representative of the employees in the aforesaid bargaining unit, with respect to rates of pay, wages, hours, and other conditions of employment, and if an understanding is reached embody such understanding in a signed agreement;

(b) Post at its plant in Frederick, Maryland, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Fifth Region of the National Labor Relations Board (Baltimore, Maryland), shall after being signed by the Petitioner's representative be posted by the Petitioner immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps the Petitioner has taken to comply herewith.

PER CURIAM

Danaher, Circuit Judge, dissents.

Dated: Feb. 7, 1955

Appendix A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECREE

of the United States Court of Appeals enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL BARGAIN collectively upon request with AMERICAN FEDERATION OF HOSIERY WORKERS, AFL, as the exclusive representative of all employees in the bargaining unit described herein with respect to wages, rates of pay, hours, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

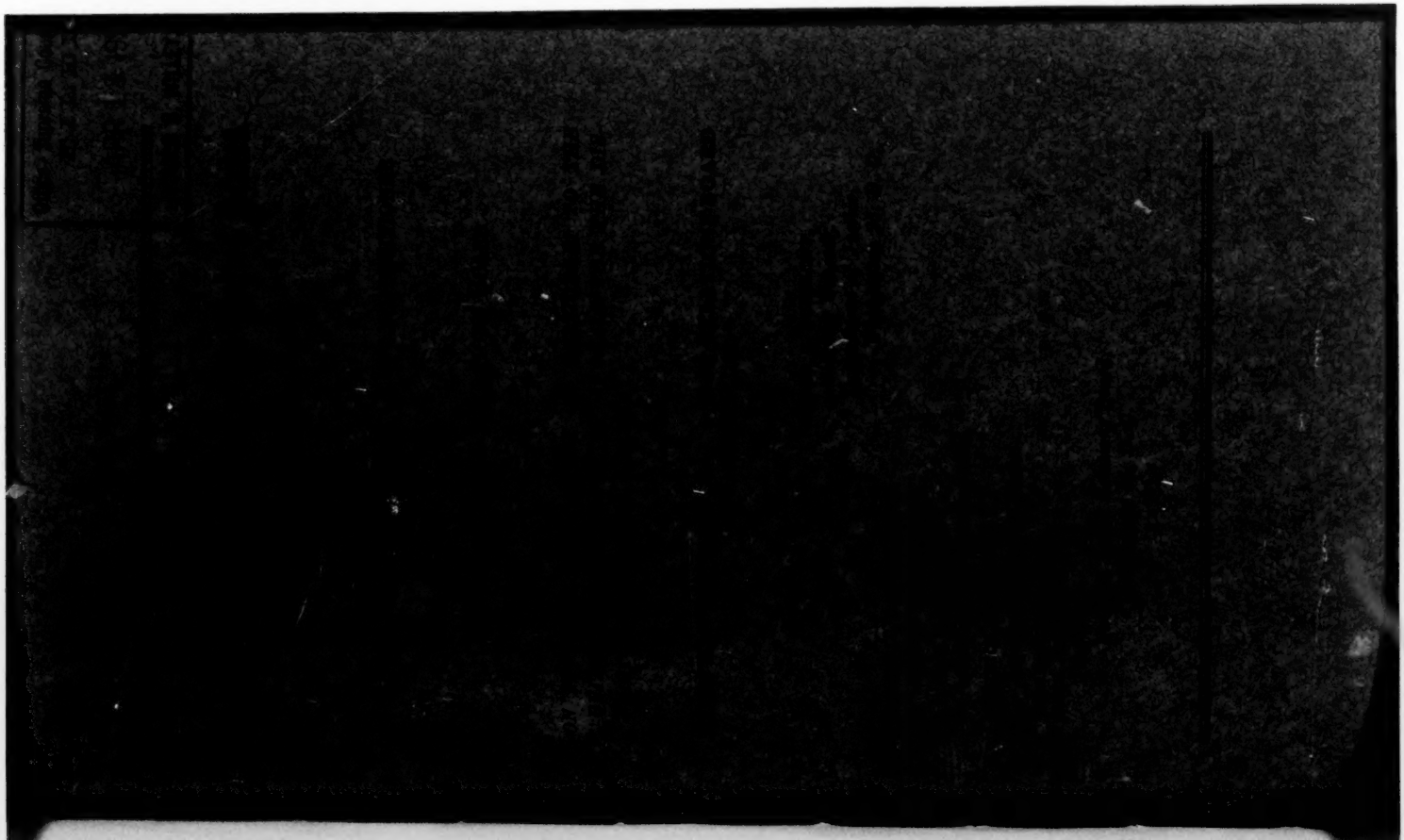
ALL production and maintenance employees at our Frederick, Maryland, plant, excluding office clerical employees watchmen, professional employees and all supervisors as defined in the amended Act.

WE WILL NOT engage in any acts in any manner interfering with the efforts of AMERICAN FEDERATION OF HOSIERY WORKERS, AFL, to negotiate for, or represent, the employees in the bargaining unit described above.

UNION MANUFACTURING COMPANY
(Employer)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.



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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 661

UNION MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 23-38) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (Pet. App. 3-22) are reported at 107 NLRB No. 61, 102 NLRB 1626, and 101 NLRB 1028.

JURISDICTION

The judgment of the court below (Pet. App. 46) was entered on January 14, 1955. The petition for

a writ of certiorari was filed on March 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether under Section 9(c)(3) of the Act strikers who have not been discharged, replaced, or refused reinstatement by their employer are eligible to vote in a Board-conducted election even though they have engaged one and three months prior to the election in strike misconduct for which the employer could lawfully have discharged them.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 38-41.

STATEMENT

The facts were stipulated by the parties in the court below (R. 4-12) and may be summarized briefly as follows:

A. The proceedings before the Board

On March 12, 1952, about eight days after a strike began at petitioner's plant, petitioner refused the request of the Union (American Federation of Hosiery Workers, AFL) for recognition. The Union filed a petition for certification on June 4, and on June 25, while the strike was still in progress at the plant, the Board conducted an election among petitioner's employees.

Of the 157 votes cast in the election, 1 favored the Union, 26 opposed the Union, and 110 were challenged, the challenges being made, in all but one instance, by the Board Agent. Most of the challenged ballots were cast by employees who were engaged in the strike and whose names were not included in the eligibility list furnished by the Company for use in the election.

The challenged ballots being sufficient to affect the result of the election, the Regional Director, on September 12, after conducting an investigation, issued a Report on Challenges. In pertinent part the Report disclosed that 82 of the challenged ballots were cast by voters who the Company alleged had engaged in picket line misconduct on occasions approximately 3 months and 1 month before the election was held, of which 23 were further disqualified by reason of their allegedly having obtained permanent employment elsewhere prior to the election. [1]

In reviewing the Regional Director's report, the Board in a Decision and Order issued on December 12, 1952, sustained the Union's contention that the voters of the contested ballots would be eligible to vote in the election regardless of whether they had engaged in the misconduct alleged by petitioner if none of them had been discharged, permanently replaced, or denied reinstatement. In so holding, the Board rejected petitioner's contention that by engaging in strike misconduct an economic striker

[1] The grounds for challenge and final disposition of ballots challenged on grounds other than picket line misconduct (R. 5-6) have no relevance to the issue here.

automatically renders himself "not entitled to reinstatement" within the meaning of Section 9(c)(3) of the Act (Pet. App. 40) and hence ineligible to vote in a Board election. The Board concluded, in the light of the Act's legislative history and settled construction, that Section 9(c)(3) was intended to preclude from voting only those economic strikers who would definitely not be included in the future bargaining unit, *i.e.*, strikers who had been lawfully discharged, replaced, or denied reinstatement by their employer, and that the provision had no application to strikers who, although susceptible by reason of misconduct to a lawful termination of their employment, had not in fact been discharged, permanently replaced, or denied reinstatement at the time of the election.[2] The Board, therefore, deferred hearing with respect to the challenged ballots and remanded the proceeding to the Regional Director for a determination whether any of the 82 voters whose ballots were contested on grounds of misconduct had been discharged or denied reinstatement prior to the date of the election.

The Regional Director reported that none of the 82 strikers whose ballots were contested on grounds

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[2] Other affirmative acts, noted by the Board, entailing loss by a striker of employee status and voting eligibility were (1) the employee's securing permanent employment elsewhere or (2) the operation of Section 8(d) of the Act (29 U.S.C. 158 (d)), which provides for the immediate loss of employee status for engaging in a strike under circumstances not here relevant (Pet. App. 5).

of misconduct had been permanently replaced, discharged, or denied reinstatement prior to the election on June 25, 1952, and that the Company had stated as late as December 23, 1952, that it had "taken no affirmative action with reference to discharges or reinstatements" of these employees. The Board accordingly directed that ballots challenged on this ground alone, together with ballots challenged on this ground and other grounds held not sustained, be opened and counted. The revised tally of ballots disclosed that ballots held valid had resulted in a conclusive election in favor of the Union. On March 17, 1953, the Board certified the Union as the exclusive representative of the employees in the appropriate unit.

Notwithstanding the certification, petitioner on April 13, 1953, refused the Union's request for collective bargaining on the ground that a hearing should have been held to determine whether the challenged voters had engaged in strike misconduct. The Board rejected this contention in its Decision and Order, issued on November 25, 1953, as "without merit inasmuch as the [Company] had not, in fact, discharged, permanently replaced, or refused to reinstate any of the challenged voters prior to the date of the election." The Board, accordingly, found that petitioner violated Section 8(a)(1) and (5) of the Act (Pet. App. 39) by refusing to bargain with the Union as the exclusive representative of the employees within the appropriate unit. It ordered the Company to cease

and desist from the unfair labor practice found; upon request, to bargain with the Union; and to post appropriate notices.

B. The decision of the court below

Observing that the sole question presented was one of statutory construction, the court below held that Section 9(c)(3) "upon its face is ambiguous," and that its terms afford reasonable support both to petitioner's reading and to the Board's view that by engaging in misconduct a striking employee does not automatically forfeit his right to vote in a Board election but instead remains eligible to vote until his employer takes affirmative action to discharge, permanently replace, or refuse to reinstate him because of his misconduct (Pet. App. 24-26). The court further held, as had the Board, that in these circumstances the intent of Section 9(c)(3) must be ascertained from its legislative history, which makes it "clear that its purpose was to make ineligible strikers whose reinstatement rights had already been destroyed by the employer's action and who were for that compelling reason ineligible for reinstatement at the time of the election" (Pet. App. 29).

One judge dissented on the ground that a contrary interpretation of Section 9(c)(3) was required to promote the Act's policy of preserving industrial peace. In rejecting this suggestion the majority in its decision noted that an "employer has a right to discharge employees who misconduct themselves" and that "a mere denial of a vote in

a bargaining agent election would add little, if anything, to the deterring effects of the employer's right to discharge" (Pet. App. 29).

ARGUMENT

1. The decision of the Board, affirmed by the court below, that unreplaced economic strikers are eligible to vote in a Board election notwithstanding misconduct prior to the election, presents no conflict of decisions and is correct. The decision is simply an application of the settled rule that strike misconduct, although grounds for discharge or refusal of reinstatement, does not automatically work a forfeiture of employee status.

It has long been settled that strikers who engage in misconduct remain employees unless and until their employer "affirmatively exercise[s] his option to terminate the relationship, either by discharging the strikers or refusing reinstatement." [3]

[3] *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 483-484 (C.A. 3). Accord: *National Labor Relations Board* v. *Fansteel Met. Corp.*, 306 U.S. 240, 255-256; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344; *National Labor Relations Board* v. *Aladdin Industries*, 125 F. 2d 377, 382 (C.A. 7), certiorari denied, 316 U.S. 706; *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183 (C.A. 6); *El Paso Elec. Co.* v. *National Labor Relations Board*, 119 F. 2d 581, 582 (C.A. 5), enforcing, 13 NLRB 213, 235-238, 240; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. 2d 903, 915 (C.A. 8); *National Labor Relations Board* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 886 (C.A. 2), certiorari denied, 342 U.S. 871; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885-886 (C.A. 1), certiorari denied, 313 U.S. 595; *National Labor Relations Board* v. *Stilley Plywood Co., Inc.*, 199 F. 2d 319, 320-321 (C.A. 4), enforcing, 94 NLRB 932, 934, 938-939, certiorari denied, 344 U.S. 933.

Applying this rule, the Board held in the only two cases to raise the issue under the Wagner Act that strike misconduct did not deprive a striker who had not been discharged of his right to vote in a Board election. *Precision Castings Co.*, 26 NLRB 528, 535-536; *Worcester Woolen Mills Corp.*, 69 NLRB 425, 429-430, enforced, 170 F. 2d 13 (C.A. 1). The present case is the sole instance in which the same issue has been raised under the amended Act.

Because the purpose of a Board election is to determine whether the employees in a particular unit are to have a collective bargaining representative, the fundamental test for voting eligibility is whether it appears likely that the voter in question will be affected by the election—that is, whether he will be among the employees whom the bargaining agent will represent. Under the Wagner Act, however, the Board departed from this general principle in one respect; it held that where economic strikers had been replaced, *both* the replacements *and the strikers* were eligible to vote. *Rudolph Wurlitzer Co.*, 32 NLRB 163, 166-167.[4] The legislative history of the 1947 amendments shows that Congress' sole purpose for providing in Section 9(c)(3) that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote" was to reverse the *Wurlitzer* doctrine, and to bar from voting *replaced* economic strikers wh-,

[4] The *Wurlitzer* case, decided in 1941, was thereafter consistently followed by the Board until the 1947 amendments. See, *e.g.*, N.L.R.B., *Eleventh Annual Report* (G.P.O. 1947), p. 21, n. 64.

because they had been replaced, would not be employed in the unit and would not be affected by the election.

As stated by Senator Ball, one of the managers of the bill in the Senate and a member of the conference committee which formulated Section 9(c)(3) (93 Cong. Rec. 4195-4196; 2 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) (hereafter cited as Leg. Hist.), p. 1102:

> *The only change made in existing law* by the amendment . . . is to limit the provision to employees who are on strike, who have been replaced, not by strikebreakers but by employees who have accepted permanent employment. The Supreme Court has held that the employees on strike who have been replaced have no right to reinstatement. [Italics supplied.] [5]

Senator Ball also stated that the provision was aimed at making "strikers who have been replaced" ineligible to vote and was intended to obviate the "ridiculous situation of a thousand persons voting for a bargaining agent for only 500 jobs" (93 Cong. Rec. 4196, A2252-2253; 2 Leg. Hist. 1102, 1525). Senator Taft similarly explained that the provision applied where strikers "have been replaced" and that "the bill provides in that case that the former employee cannot vote in the

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[5] The dissenting opinion in the court below, in suggesting that Congress may have had additional objectives in mind (Pet. App. 35-36), overlooks the force of Senator Ball's reference to "the only change made in existing law."

election," 93 Cong. Rec. 3838-3839, 2 Leg. Hist. 1014.[6] See also Senator Taft's statement to the Eighty-First Congress that repeal of this provision would only mean that the Board would "probably go back * * * to the rule established * * * before the Taft-Hartley law, namely, that both the strikers and the permanent employees may vote." 95 Cong. Rec. 8587.[7]

2. Petitioner contends (Pet. 9-16) that, notwithstanding the legislative history, a literal reading of the provision requires that the franchise be withheld from strikers guilty of misconduct because they are not "entitled to reinstatement." But this contention proves too much, for in a literal sense *no* striker is "entitled to reinstatement"; as petitioner concedes (Pet. 10), he is "entitled" only to non-discriminatory treatment for having gone on strike. Thus, reinstatement may be lawfully denied not only to strikers guilty of misconduct, but also to strikers whose jobs have been abolished, or who are physically incapacitated, or who have become *persona non grata* to the employer for reasons unconnected with the strike.[8] In short, petitioner's

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[6] Other legislative history is summarized in the opinion of the court below, Pet. App. 26-29.

[7] For other post-legislative history reflecting the limited purpose of Section 9(c)(3) see the *Report of the Joint Committee on Labor-Management Relations*, S. Rept. No. 986, Part 3, 80th Cong., 2d Sess., p. 75; S. Rept. No. 99, Part 2, 81st Cong., 1st Sess., p. 5; S. Rept. No. 1211, 83d Cong., 2d Sess., pp. 12, 52.

[8] A striker, like any other employee, may be discharged for "a good reason, a bad reason, or no reason at all," save only that he may not be discriminated against for activity protected

literal reading of Section 9(c)(3) leads to the conclusion that no striker can vote, a result envisioned in the Senate Minority Report from which it quotes (Pet. 17).[9] But this reading was explicity rejected by the sponsors of the legislation, who indicated, as we have noted (p. 9), that the only change made in existing law was to make strikers who had been replaced by employees who had accepted permanent employment ineligible to vote.

The determination of eligibility must, as petitioner recognizes (Pet. 22), be made at the time of the election. As of this date, no economic strikers are "entitled to reinstatement" in any absolute sense, for, as we have shown, any of them *may* on the happening of various contingencies lawfully be denied reinstatement. On the other hand, the right to reinstatement of strikers who have been lawfully discharged or permanently replaced has already been defeated. This latter group was the one which

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by the Act. *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C.A. 3); Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46.

[9] The sentence preceding the excerpt quoted by petitioner (Pet. 17) reveals the understanding of the minority. The Report states (S. Min. Rept. No. 105, Part 2, 80th Cong., 1st Sess., p. 10; 1 Leg. Hist. 472): "As we understand this provision it would prevent employees who go out on strike because of a dispute over such matters as wages, hours, or working conditions from voting in a Board election held during the strike. This restriction is not conditioned upon replacement or an offer of reinstatement by the employer. It is automatic." But, as this Court has pointed out, "it is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395.

Congress intended should be excluded from the election inasmuch as these discharged or replaced strikers are the only ones who it is known at the time will not be affected by the choice of a bargaining representative.

The judicial precedents relied on by petitioner (Pet. 9-14) are not in conflict with the decision below. Without exception these cases involve situations in which the employer had as of the date of the election discharged the employees or refused them reinstatement because of their misconduct; none of them hold that misconduct of itself works a forfeiture of employee status. See cases cited at page 7, note 3, *supra*.

3. Underlying petitioner's contentions, and articulated by the dissent in the court below (Pet. App. 30-38), is the idea that strike misconduct should be punished by loss of voting rights. This theory, however, has been consistently rejected by Congress, which has repeatedly refused to impose an automatic loss of status on persons who engage in strike misconduct. In debates on the Case Bill, the 79th Congress rejected a provision that would have penalized strike misconduct with loss of the franchise in Board elections.[10] Amendments to the Case Bill, offered by Senators Taft, Ball, and Smith (all later members of the Committee which formulated Section 9(c)(3) of the Act), provided that employees who struck in breach of contract

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[10] See H.R. 5262, 79th Cong., 2d Sess., Sec. 11(a), discussed at 92 Cong. Rec. 687, 786, 1070-1071, 5926, 5929.

or in advance of a "cooling-off" date would forfeit their status as employees, including voting rights, but employees who were guilty only of strike misconduct would forfeit only rights under Section 10 of the National Labor Relations Act (29 U.S.C. (1946 ed.) 160). S. Rept. 1177, Part 2, 79th Cong., 2nd Sess., pp. 4, 7, 10-11, 19-21. Finally, where Congress in the amended Act chose to work a forfeiture of voting rights (*i.e.*, rights under Section 9 (29 U.S.C. 159)), it did so expressly and applied that penalty only to employees who strike during the waiting period prescribed by Section 8(d) (29 U.S.C. 158(d)).[11] There is thus no warrant for the inference, urged by petitioner, that it was the purpose of Congress in amending Section 9 (c)(3), to impose an automatic forfeiture of voting rights on strikers who engage in strike misconduct.

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[11] The closing sentence of Section 8(d) provides:

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

CONCLUSION

The judgment of the court of appeals is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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